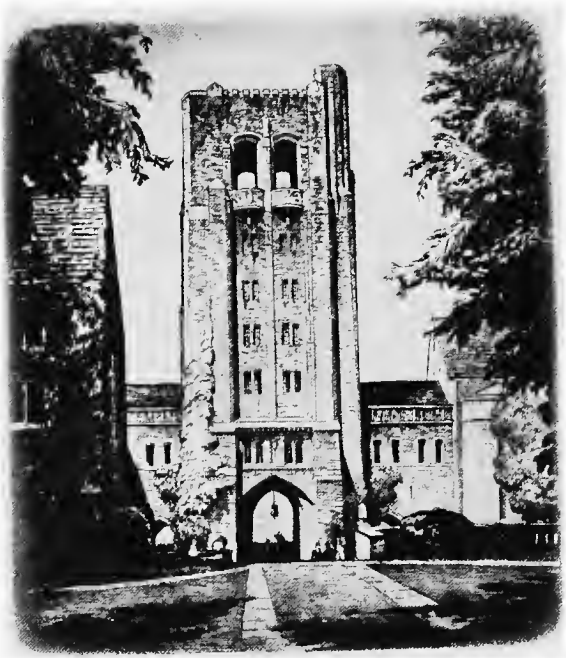

POPULAR LECTURES

ON

COMMERCIAL LAW.

WRITTEN FOR THE USE OF MERCHANTS
AND BUSINESS MEN.

BY

GEORGE SHARSWOOD.

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ADVERTISEMENT.

THE following Lectures were prepared for the use of the pupils of "Crittenden's Philadelphia Commercial College," without any view to their publication. They were reported and published in the newspapers, and are now collected in a volume, not by the author, but by the Principal of the Institution, for whose use they were delivered. It is deemed but just to make this explanation, as they are not of a scientific or professional, but, as the title imports, of a popular character. The leading principles of the topics of Commercial Law treated are stated and explained in familiar language, so as to be easily understood by those

who are not lawyers by profession; and as the book is intended solely for this class of persons, it has not been deemed advisable to encumber the pages with the citation of authorities.

S. W. C.

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LECTURE I.

ON CONTRACTS.

Contracts, either Executed or Executory—Parole or under Seal—Express or Implied—Contracts by Letter—Capacity to Contract—Lunatics—Minors—Married Women—Ignorance of Law or Fact—Duress—Fraud—Immoral or Illegal Contracts—Usury—Consideration—Need not be Adequate—Mutual Promises—Past Consideration—Moral Obligation—Compromises of Doubtful Rights—Forbearance.

An acquaintance with the general principles of Commercial Law is important to all business men. Fortunately the technicalities, which embarrass the unprofessional reader in other departments of legal study, do not stand in his way in this. The Mercantile Law is comparatively of modern growth. It rested, originally, upon principles imported from the Roman jurisprudence, intermingled with the customs and usages of merchants. So far as the Roman Code is concerned, that has been justly termed a system of written reason, and the customs and usages of merchants of course were founded in a practical knowledge of what was at the same time just and convenient. Hence there are no mysteries in that study upon which we are

now about to enter—nothing which cannot be made intelligible to any well-educated mind. Not that there do not exist some arbitrary rules and distinctions—some general principles which, in their application to particular cases, occasionally work injustice. It is essential to every system, which assumes to regulate the transactions of a commercial community, that such rules should exist—and all the particular injustice, which may result, will be found, when traced to its source, to be owing to ignorance of them in those who engage in such transactions. It would be fatal to admit ignorance of the law as a ground to relieve men from the legal effect of their acts and contracts. It would be tantamount to saying, that there should be no rule at all, and that every controversy should be decided ultimately by the gauge of the understanding and information of the parties. This single consideration is sufficient to evince the value of the acquisition of knowledge upon this subject. Allow me to urge it upon your attention. In the course which has been allotted to me, I can hope to do no more than place before you the most usual, practical, and, therefore, the most important elementary principles. It will be my endeavor to do so in a popular and simple manner; but it is my duty to forewarn you that it is a subject which does not admit of either humor or eloquence, and to gain instruction from such a course, will require not only regular attendance, but close application and the exercise of reflection and memory.

The great basis of the Commercial Law is the Law of Contract, and with that, therefore, we begin.

A contract is an agreement upon sufficient consideration to do or not to do a particular thing. You will observe from this definition, that there are three important elements which enter into a contract. There must be 1. An agreement. 2. A subject-matter. 3. A consideration.

1. *An Agreement.* Contracts are either executed or executory. When contracts are fully carried out and performed, they are termed executed: when anything remains to be done, they are executory. Thus upon the purchase and sale of a lot of goods, when the price is paid and the goods delivered, the contract is executed. Should it be accompanied with a warranty of the goodness of the articles, that would be a subsisting executory contract. If either the price is unpaid on the one side, or the goods not delivered on the other, so far the contract of sale may still be executory.

Another division of contracts is into those which are under seal and those which are not under seal. The former kind are termed specialties—such are bonds. The latter are called parole. In general there is no distinction made between contracts reduced to writing without seal, and mere agreements by word of mouth. I say in general; because in promissory notes, bills of exchange, and bank checks, which must be in writing and not under seal—for, if under seal, they lose their commercial character—there do exist some differences. There is still another division of contracts into those that

are *express*, and those *implied*. The former is where the parties have expressly settled between themselves the terms; the other is where the contract and the terms of it are inferred by the law from the relation of the parties. Thus, if one man purchases a piece of cloth of another at so much per yard for cash, that is an express contract. If he makes the contract without fixing the price, the law implies a contract to pay the market price; if nothing is said about cash or credit, the law, in the case of an ordinary purchase, implies that it is for cash, or if it is between merchants or traders, that it is upon such a credit as the custom of the trade or the previous dealings between the parties have settled. So if a man hires as a clerk or salesman in a store at a fixed price, for so long a time, or as long as both parties please, that is an express contract. But if these terms are not settled, or, what often happens even when they are, if there is no evidence of them, the law implies an agreement to pay the reasonable worth of the services, according to the usual market rate, and for a period of one year, if no legal cause should arise for dissolving the relation sooner.

It sometimes happens that a commercial contract is made by letter, and it then becomes necessary and often difficult to know at what period of time it is to be considered as complete, so as to bind all the parties. It is plain the parties at some fixed point of time must agree, in order to constitute a bargain. The general rule is, that

if an offer or proposal be made on one side it becomes a contract as soon as accepted. Up to that period the proposer may withdraw or modify his offer; but after that period it is beyond his power. Thus a bid at auction may be retracted at any time before the hammer is down, but not afterwards. In a recent English case, and which has been followed by the Supreme Court of this State, the defendants had offered to sell the plaintiffs a parcel of wool on time, expressed in a letter, "receiving an answer in the course of post." The letter being misdirected, did not *go* by course of post, but the plaintiffs wrote as soon as it was received, that they would take the wool on the terms proposed. The defendants, however, not having received the answer when they expected it, sold the wool to another. The court said, that if a bargain could not be closed by letter before the answer was received, no contract could be completed through the medium of the post-office; that if the defendants were not bound by their offer when it was accepted, then the plaintiffs ought not to be bound until after they had received a notification that the defendants had received their answer, and assented to it, and that so it might go on *ad infinitum;* that the defendants must be considered in law as making, during every instance their letter was travelling, the same offer to the plaintiffs, and that the contract was completed by the acceptance of it; and that as the delay in notifying it arose from the

mistake of the defendants themselves in misdirecting the letter containing the offer, it was to be taken as against them that the answer had been received by course of post. It is settled, therefore, that an offer to contract communicated by post, must be considered as continually made until it reaches the other party. If he accepts before knowledge of a retraction of the offer, the contract is binding. (5 Barr, 339.)

It is implied in the very word agreement, that the parties to it have sufficient understanding, and age, and freedom of will and of the exercise of it, for the given case. An idiot or lunatic is not competent to make a valid contract. When, however, such a one is supplied with necessaries suitable to his condition and circumstances, he and his estate are liable for payment; and if a contract be made by a stranger with a lunatic, without knowing his condition, in the ordinary course of business, and nothing occurs, which ought to excite the suspicions of a prudent man, the contract will be binding, provided it has been executed by either party. In a case, in which an action was brought to recover back the price of goods, which a person, proved to have been insane, had bought and paid for, and in which there was evidence that the purchase was an improvident one, Chief Justice Gibson, after declaring that an insane person would be liable for goods innocently furnished to his order, remarks: "Should he have made a wild and unthrifty purchase from a stranger, unapprised of his infirmity,

who is to bear the loss that must be incurred by one of the parties to it? Not the vendor, who did nothing that any other man would not have done. As an insane man is civilly liable for his torts, he is liable to bear the consequence of his infirmity, as he is liable to bear his misfortunes, on the principle that where a loss must be borne by one of two innocent persons, it shall be borne by him who occasioned it. A merchant, like any other man, may be mad without showing it; and when such a man goes into the market, makes strange purchases, and anticipates extravagant profits, what are those who deal with him to think? To treat him as a madman, would exclude every speculator from the transactions of commerce. The epidemic of the country is an impatient desire to become suddenly rich by desperate adventure, instead of awaiting the slow but sure approach of wealth from industry and small profits." Had there been fraud or undue advantage taken —or had there been anything unusual in the conversation or demeanor of the party—it would doubtless have been otherwise. (10 Barr, 56.)

Twenty-one years is full age in both sexes. It is sometimes supposed that a woman is of full age at eighteen, but that is an error which has arisen from the fact, that she cannot be bound to serve as an apprentice beyond that age. She is free from her indentures at eighteen. But males and females are alike in this respect, that under twenty-one their contracts, except for necessaries, are in

general voidable. A void contract is one which is an absolute nullity, so that no subsequent act of the party can make it good. There must be a new contract founded on a new consideration. A voidable contract is one which may be ratified by subsequent assent or confirmation. There are some contracts of infants, which are absolutely void; and it may be stated that these are, either where the form of the contract is such as in law precludes an inquiry into its consideration, as a confession of judgment in court, or when no benefit or appearance of benefit has accrued or could accrue to the infant, as where he has gone security for another. All merely voidable contracts, where a benefit has or might have accrued to the infant, may be ratified by him after his arrival at full age. To constitute a ratification, there must be some distinct act by which he receives a benefit from the contract after twenty-one, or does some act of express ratification. A mere acknowledgment of the debt or a payment of part, is not enough; nothing short of an express promise, with full knowledge of his rights and privileges after his arrival at full age, will amount in law to a ratification of a contract made by a minor, which was not binding during his minority. (2 Serg. and Rawle, 306; 3 Barr, 428.)

There is an exception, however, which has already been adverted to, to the rule that an infant is incapable of binding himself by contract; and that is the case of a contract for necessaries. It

has been held, however, that though an infant may in some cases bind himself for necessaries, yet that he cannot do so when he has a guardian or parent to supply his wants. It is therefore incumbent on those, who mean to create an obligation binding on an infant, when he has a parent or guardian extending towards him his care and protection, to apply to such guardian or parent and contract with him. (4 Watts, 80.) There is no personal liability on the part of a guardian even for necessaries furnished to an infant, without he bind himself by an express contract. The creditor's only recourse is the infant's estate. It is otherwise with the father. The father is entitled to the services of the child, and is bound to support him. If, therefore, a parent refuses to furnish his child with necessaries, a stranger may do so and charge the parent with the price. (4 Watts and Serg. 118.) In all cases, however, a tradesman deals with a minor at his peril: he is bound to inquire and satisfy himself as to his circumstances and wants, and even if the articles which he sells to him appear to be necessaries suited to his condition, if in point of fact he has already been sufficiently supplied by others, he must lose his claim. If a minor is supplied, no matter from what quarter, with necessaries suitable to his estate and degree, a tradesman cannot recover for any other supply made to the minor just after: and the reason for it is a plain one. The rule of law is that no one may deal with a

minor; the exception to it is that a stranger may supply him with necessaries proper for him, in default of supply by any one else; but his interference with what is properly the guardian's business, must rest on an actual necessity, of which he must judge at his peril. It is the tradesman's duty to know, therefore, not only that the supplies are unexceptionable in quantity and sort, but also that they are actually needed. When he assumes the business of the guardian for purposes of present relief, he is bound to execute it as a prudent guardian would, and consequently to make himself acquainted with the ward's necessities and circumstances. (8 Watts and Serg. 80.)

The disability of a married woman to contract so as to bind herself, arises not from want of discretion, but because she has entered into an indissoluble connection, by which she is placed under the power and protection of her husband, and because no contract she can make can enure to her own benefit, as all her personal property was, at common law, the property or within the control and power of her husband. Although by the Married Woman's Act of Pennsylvania (Act of April 11, 1848), her property is now secured to her from the reach of her husband or his creditors, her disability to contract is unaffected by the statute. When indeed she could have bound her husband before by an implied agency, for necessaries for herself and family—if he has no property sufficient to answer the charge,—hers may

be reached by the process of the court. Whatever contracts a married woman makes with the assent of her husband, he is liable for. If he knows and does not express his dissent to the creditor, the law implies his assent. If she keeps a store and carries on business with his knowledge, he will be liable for the contracts made in the course of it. Her promissory note indeed is absolutely void; otherwise, if it went into the hands of a *bona fide* holder, the consideration could not be inquired into; but even then if the note were given for goods sold, the holder would be entitled to use the name of the payee or vendor in an action to recover the price which formed the original consideration. If a husband, without good reason, turns his wife out of doors without making suitable provision for her, he thereby gives her a letter of credit for whatever necessaries may be suitable to her condition and station in society. If the wife elopes, he is not chargeable even for necessaries. The very fact of the elopement and separation is sufficient to put persons on inquiry, and whoever gives the wife credit afterwards, gives it at his peril. If he is not guilty of any cruelty, and is willing to provide her a home, and all reasonable necessaries *there*, he is not bound to furnish them *elsewhere*. All persons supplying the food, lodging, and raiment of a married woman living separate from her husband, are bound to make inquiries, and they give credit at their peril.

We have already adverted to the well-settled

doctrine, that ignorance of law forms no title to relief from a contract, either in law or equity. It is true, however, that where there is a mistake of a clear, well-established and well-known principle of law, whether common or statute law (for in this respect we can see no difference), equity will lay hold of slight circumstances to raise a presumption that there has been some undue influence, imposition, mental imbecility, surprise, or confidence abused. But it is obvious that in such cases the mistake itself is not the foundation of relief, but the relief is had on entirely independent grounds, so as not to impugn the general rule (7 Watts & Serg. 252.) When, however, there is an ignorance of fact, some observations are necessary. Parties are not bound to make a disclosure to each other of facts when opportunities for information are equally open to both. In point of morality there can be no doubt that it is the duty of each party to conceal from the other no circumstances which might influence his mind, but it would not be practicable to apply such a rule to the determination of legal controversies (2 Wheat. 178). When, however, parties deal upon the basis of mutual mistake as to facts, or even upon the basis of a mutual expectation that certain things will be done by others, which never are done, equity will relieve against the contract (3 Barr, 21).

If the contract is entered into by means of violence offered to the will, or under the influence of undue constraint, the party may avoid it

by the plea of duress. Force and fear annul engagements, when they are such as shake a mind of ordinary firmness. Unlawful imprisonment, or the fear of it, will avoid a contract. The English courts have held that duress of goods, or the unlawful detention of a man's property, will not avoid a contract voluntarily entered into. The party had his legal remedy, and was bound to resort to it. It has been settled, however, that money paid to redeem goods wrongfully seized, or to prevent the wrongful seizure, may be recovered back by the party making the payment, and although duress of goods may not by itsel be sufficient, it will certainly in all cases form an element in the consideration of the question, whether there has been fraud, misrepresentation, or imposition.

Fraud vitiates whatever it touches. Wherever there is a misrepresentation of facts relating to the subject of a contract, wherein anything is said or done with a design or tendency to blind the other party to the true state of the case, or to mislead and prevent his seeking information in the proper quarter, the contract is fraudulent and void. So if there is any trick or artifice, by which one party is injured, and the agreement prevented, from its fair and equal consequences; as in stock-jobbing contracts, to deliver a given number of shares at a day certain, in which the seller's performance has been forestalled, by what is called cornering, in other words, buying up all the float-

ing shares in the market. The legislature has very properly interfered, and made all contracts for the sale and purchase of stocks on a longer time than five days void; but there may be, and sometimes is, cornering practised in the purchase and sale of other merchandise on time besides stocks. It is impossible to specify all the forms which fraud, Proteus-like, assumes. The ingenuity of mankind is constantly in exercise to devise modes of acquiring property without an equivalent, and the *auri sacra fames*—the accursed thirst for gold—is powerful as well to sharpen the inventive faculties as to blunt the moral sense. To a merchant, in the long run, this will always be a losing business. Now and then he may succeed in realizing a handsome profit in some bargain, in which he has taken an unwarrantable advantage of his neighbor. Solemn are the warnings of the wise man: "An inheritance may be gotten hastily at the beginning, but the end thereof shall not be blessed." "The getting of treasures by a lying tongue is a vanity tossed to and fro of them that seek death." The loss of that good name which, to all men, is better than riches, and to the merchant especially, as the foundation of credit and confidence, even if a balance sheet of profit and loss in dollars and cents is struck, will far outweigh occasional unjust gains. I am persuaded that the more candid, open, and straightforward a man is in his business transactions, the greater are the probabilities of his acquiring a

competent fortune; and sure he may be that, whether successful or not, he will always possess the respect of the community in which he lives, and the approbation of his own conscience. It is to be observed that when there has been found in a contract actual bad faith in one of the parties, no new assent or ratification by the other side, even after it has come to his knowledge, will estop him from insisting upon its invalidity. What was once a fraud will always be so. The fraudulent party, of course, can never take advantage of his own wrong. The reason is that a contract infected with actual fraud is not merely voidable, but absolutely void; and there can be no confirmation without a new consideration, and of course a new bargain. (4 Serg. and Rawle, 487.)

2. We come now to the subject-matter of the agreement. A contract is an agreement to do or not to do some particular thing. The subject-matter must be possible. A contract to do that which is impossible is void. It must be lawful. A contract to do an immoral or an illegal act is void. It matters not whether the act be wrong in its own nature, or being indifferent in itself is made unlawful by an act of the legislature. Every contract made by or about a matter or thing, which is prohibited and made unlawful by any statute, is a void contract; though the statute itself doth not mention that it shall be so, but only inflicts a penalty on the offender; because a penalty implies a prohibition. There is one case, which is an apparent exception to this general

principle. The statute of usury prohibits the taking of more than legal interest under a penalty. It would seem then, according to the general principle, that any contract into which usury enters should also be absolutely void. It is so, indeed, in England, New York, and many other States; but in these countries the statutes upon the subject expressly avoid the contract. Our act of Assembly in Pennsylvania does not; and hence, as between the parties, it is only the excess over legal interest which is illegal and void. The amount loaned with legal interest may be recovered, whatever may be the usury agreed on. The lender, indeed, subjects himself to liability to lose the entire principal should an action be brought against him to recover that penalty, one-half to the Commonwealth, and the other half to the person who sues for and recovers the same. The reason of this anomaly may be that at an early period the Courts drew a distinction between an unlawful act which was wrong in itself, and one indifferent in its own nature, but to which the legislature had affixed a penalty. They used to hold that if the penalty was paid, that was all that was required, and the courts were not bound to assist the execution of such laws collaterally. While this was the prevailing doctrine, the construction of the usury act was settled; and although the distinction referred to has been universally and justly exploded, it has not been deemed wise to go back on that account, and

unsettle what had been decided and become incorporated with the general usages and understanding of the business community. To render a transaction usurious, according to the English laws, more than the legal rate must be received on the loan of money or other valuables. If it be in reality a *loan*, it matters not what form it may assume—how it may be veiled or disguised. The courts will not permit the statute to be evaded by any contrivance of ingenuity. It is supposed that our Pennsylvania act goes further than the English statute. Our act declares the offence to consist in taking more than the legal rate of interest, not merely for the loan, but "*for the loan or use of money*" (act of 2d March, 1723). Two persons were partners in the erection and business of a steam mill, on terms of dividing the profits, and bearing equal parts of the expense. Shortly after the mill was in operation, they agreed that one of them should take all the profits, pay the debts, and pay the other partner $8,500 for his interest in the concern, *when it should be convenient*, and in the meantime pay him "a yearly rent," as the parties expressed it, of $640, being a sum greater than lawful interest for the purchase-money. It was held to be usurious, on the ground that when the price of a thing is permitted to be retained for the accommodation of the purchaser, it is as purely a loan as if it had been paid to the seller in the first instance, and formally returned to the purchaser (13 Serg. &

Rawle, 218). A fair purchase, indeed, may be made of a bond or note even at 20 or 30 per cent. discount, without incurring the penalties of usury. But even then it must be a real bond or note; not a mere kite. If the paper were made for the mere purpose of raising money upon it, the discounting of it would be looked upon as in effect a loan, and it would be usurious. Such is unquestionably the law whenever the man who makes the discount is aware of the character of the transaction; and there are many cases and opinions that the same thing follows, whether he knows it or not. It never, however, has been conclusively settled by the Supreme Court in this State.

Giving to a charge for the loan or use of money the name of commissions, will not alter its nature, though the transaction be a mercantile one. An attempt to cover a premium of more than six per cent. for the use of money by such a name would be fruitless. To call it a commission would not alter its nature. When a commission is spoken of, it implies something to be done, on which a commission would arise, because it is no more than a compensation for hazard or business. When there has really been a loan or advance of money, it is so easy to cloak usurious interest under the name of commission, that the law contemplates it with a jealous eye. A commission, however, may be paid on a mere loan of credit, as for an indorsement or guarantee. A broker

or agent may charge a commission, besides interest, on advances; but that is only another mode of ascertaining his compensation for his trouble and attention about the business of his principal. Thus, too, it has been decided that a reasonable commission beyond legal interest for extra incidental charges, as for agency in the remittance of bills for acceptance and payment, is not usurious; and in no case would an express agreement that if the creditor should be obliged to sue, he might recover, in addition to the debt and interest, damages for costs and expenses incident to the suit, be regarded in that light.

There are other classes of illegality, such as those contracts which are in restraint of marriage —in restraint of trade—which interfere with the due administration of trade and justice, such as agreements to puff at auction—signing composition deeds, and making a private contract to give a preference—buying off opposition to a bankrupt or insolvent—which it is not within our compass to explain at large. It will be enough to have thus hastily mentioned them, and to say that whenever an act is immoral or wrong in itself—prohibited by law—against public policy—as tending to restrain trade—to give a false color to things, so that the public may be deceived or misled—or to obstruct or prevent the pure administration of justice according to law—all contracts whose subject-matters are at all connected with such objects, will not be enforced by courts of justice. When,

indeed, such a contract is entirely executed and performed and the unjust proceeds have been realized, the courts will of necessity entertain jurisdiction of controversies arising as to those proceeds. Thus, if there are joint adventurers in illegal stock-jobbing transactions, and a dispute arises about the possession or distribution of the proceeds, they will decide to whom they belong. They have no power to inquire of their own motion where the money came from, to whom it rightfully belongs, and return it to its real owner.

3. We must hasten now to the *consideration* which is necessary to make a valid contract. In an ordinary plain contract—bonds, specialties, bills of exchange and promissory notes, stand on a peculiar footing, as will be observed hereafter—the consideration must either appear on its face, or must be shown affirmatively by him who seeks to recover on it. A consideration may be briefly defined to be any benefit, delay, or loss to either party. More fully, a consideration is something that is either a benefit to the party promising, or some trouble or prejudice to the party to whom the promise is made. Any damage or suspension, or forbearance of a right, will be sufficient to sustain a promise. A consideration is sufficient, if it arise from any act of the plaintiff, from which the defendant or a stranger derives any benefit, however small, if such act is performed by the plaintiff with the assent, express or implied, of the defendant; or by reason of any damage or any suspension, or forbearance

of the plaintiff's right at law or in equity; or any possibility of loss occasioned to the plaintiff by the promise of another, although no actual benefit accrues to the party undertaking. It is sufficient that a slight benefit be conferred by the plaintiff, on the defendant or a third person, or even if the plaintiff sustain the least injury, inconvenience, or detriment, or subject himself to any obligation without benefiting the defendant or any other person. It is not essential that the consideration should be adequate in point of actual value. The law does not weigh the *quantum* of consideration, having no means of deciding upon that matter; and it would be unwise to interfere with the facility of contracting, and the free exercise of the judgment and will of the parties. The law allows them to be the sole judges of the benefits to be derived from their bargains, provided there be no incompetency to contract, and the agreement violates no rule of law. There is no case where mere inadequacy of price, independent of other circumstances, has been held sufficient to set aside a contract between parties standing on equal ground, and dealing with each other without any imposition or oppression. Such an inequality as would amount to fraud, and avoid the contract on that score, must be so strong and manifest, as to shock the conscience, and confound the judgment of common sense. This legal principle, as to the extent of consideration, is, in some measure, practically modified by an equitable one, which relieves

the parties to a contract wherever the consideration of it fails; as where a contract was made upon the expectation of an actual benefit, which has not been realized, and that without the fault of the party seeking relief: or there may be a failure in part, which will entitle him to a proportional reduction in the price of what he was to pay.

We will consider a few of the most ordinary kinds of consideration. The actual receipt of money, or other valuable thing, in consideration of which the party enters into any undertaking, is of a character not to require particular attention.

1. After this, one of the most usual is that of *mutual promises*. A mutual promise amounts to a sufficient consideration, provided the mutual promises be concurrent in point of time, and in that event the one promise is a good consideration for the other. I agree with a man to build me a ship: the promise to do the work is consideration for my promise to pay him a certain sum for doing it. I promise to pay him the money in consideration of his promise to do the work for me. If two concurrent acts are stipulated, no action can be maintained by either without showing a performance, or what is equivalent to a performance of his agreement. The general rule in such a case undoubtedly is, that when a contract is entire, before any recovery can be had of the consideration-money, the plaintiff must prove that he has performed, or is ready to perform his part of the contract, or that the performance was prevented by

the other party. Should a party stipulate for the performance of an entire service or business, and then having but part performed it, voluntarily abandon the service or leave the work unfinished, or in such a state as to be useless, he could not claim to recover anything: so if he obstinately and perversely refuses to go on and complete it when it is in his power, and when the other party requests it, and offers to pay for it. But if the party, acting honestly, and with a *bona fide* intention of fulfilling the contract, performs it substantially, but fails in some comparatively slight particular, and the other party has received and held the fruits of his labor and money and time, he ought not to be allowed to do so without paying a fair compensation, according to the contract, receiving credit for whatever loss or damage he may have sustained. So if a contract requires the performance of an entire work by one party, yet if the other party dispense with the performance of portions of it, the plaintiff may recover in an action on the contract, the sum he is entitled to for the work actually done.

It is a general rule in regard to cases of mutual promises, that if a day be appointed for the payment of money, or part of it, or for the doing of any other act or thing, and the day must or may happen before the thing, which is the consideration of the money or other act is to be performed, an action may be maintained as soon as the day is past without performance. The reason is, because

from the very nature of the thing, it is apparent that the party has relied on his remedy, without intending to make performance by the other party a condition precedent. Whenever time admits of compensation, as perhaps it always does when the payment of money is in question, it is never essential that it should be strictly complied with. Indeed, it was at one period seriously doubted whether it was possible for parties, by the force of any language, to make time of the essence of a contract, when the lapse of it could be compensated; but there is now no doubt that when it clearly appears that such is the intention of the parties, it will be carried out both at law and in equity.

2. In general, a past consideration is not a sufficient consideration. A voluntary service rendered by one man to another, gives the former no legal claim. It is otherwise if it were preceded by a request. Such a request may be either express or implied. It must be admitted, however, that this principle has been affected to some extent by a class of cases which recognize that a moral obligation is a good consideration upon which to found a contract, and it has been held latterly, that whenever a benefit has been derived by one man from the voluntary services of another, then there is a moral obligation to compensate them. A case which occurred and illustrates this position was this: There was a contractor on a railroad, who had performed a large part of his contract, and

being heavily in debt he made an assignment for the benefit of his creditors. The assignee made an agreement with a third party to go on and finish the contract, which was necessary in order to receive anything. A number of the creditors then drew an order on the assignee, in favor of the party who had completed the contract, for what he was to receive. The Court decided that this order was a promise, founded on a sufficient consideration, and could not be revoked by those who had signed it as a mere naked order might have been, and it is said that though anciently a past consideration was thought inadequate to support a present promise to pay, it has long been settled that a benefit derived from the unsolicited services of another, creates a moral obligation of sufficient potency to sustain an express promise (10 Barr, 366.)

3. The *moral obligation*, which has already been mentioned as forming a sufficient consideration, is not every loose relation which in common parlance would be so entitled. Besides that instance just referred to, when actual benefit has been received from the unsolicited services of another, it is confined to a class of cases where there was once a legal obligation which has been lost by lapse of time or otherwise, or what, but for some technical rule of law, would be a legal obligation: as, in the case where a man has been discharged under a bankrupt law—or when he has been voluntarily released by his creditors upon a receipt

of a part only of their claims. In law their demands are extinguished, yet by the common sense and feeling of mankind, the debt exists, and the debtor is under a moral obligation to pay the debt as soon as his circumstances render it convenient and proper. So when an infant has borrowed money, or contracted a debt, though not for necessaries—at law there is no remedy against him or his estate, yet he is morally bound, if the contract was a fair one, and his promise to pay it, after arriving at full age, will be binding upon him. So, also in case of a claim barred by the statute of limitation—though the remedy is gone, the debt in conscience is not gone, and a promise to pay it, made with sufficient distinctness to the creditor himself, or some one authorized by him, will be binding. It will be observed, that in all these cases there was a prior subsisting legal obligation. On the other hand, where a father made an assignment of a claim, which he held, to his daughter, in consideration of natural love and affection, it was held insufficient to support the assignment. So the promise of a father to pay a son's expenses, where they had been previously incurred, in consequence of sickness while among strangers, was held to be destitute of consideration. Every man is, indeed, under a moral obligation to maintain and provide for his offspring, but it is an obligation which springs from the dictates of his nature, not from a benefit received from the parent, or a prejudice suffered by the child.

4. Another class of cases which borders very closely on the confines of naked promises are *compromises of doubtful rights.* These are sustained by the law upon a principle of public policy to discourage litigation and to encourage the amicable settlement of lawsuits. It is evident that if a party, after having bought off an adversary by a promise or security, were to be allowed to set up as a defence that there was originally no lawful claim upon him, and that, therefore, his promise or security was without consideration and void, no lawsuit ever could safely be compromised, unless, indeed, by the actual payment of money and a release under seal. It is held, therefore, that a compromise of a doubtful title, when procured without such deceit as would vitiate any other contract, excludes the parties, even though they may have been ignorant of the extent of their rights. Such compromises have been supported though there was a mutual mistake of the law, the parties having acted in good faith. In one case it was laid down that if the promise was made in ignorance and by surprise, when, in fact, the party promising was not responsible, he would not be bound by it. But if his liability on the law and facts was only doubtful he would be bound. (6 Barr, 417.) I think it would be more accurate to say that in the absence of such misrepresentation, imposition, or fraud as would vitiate any other contract, the compromise of a dispute, whether doubtful or not, in ignorance of the law or otherwise, if made in

good faith, ought to be upheld. That the claim set up was palpably without any color of right, would be a circumstance to show fraud or imposition upon a weak understanding; but if a man with his faculties about him, deliberately makes a promise to get rid of an annoying claim, though worthless, it would draw the courts into altogether too nice a discussion to determine how near a bad claim must come to a good one in order to be doubtful; in other words, what precise degree of doubt there must be in order to give validity to a compromise. It has accordingly been decided by the Supreme Court of this State, that the compromise of an action of slander, in which the declaration did not show any cause of action, the words laid not being actionable, was a good consideration for a note for the payment of money. (2 Penna. Rep. 531.)

5. The last class of considerations which I shall notice is that of *forbearance* to sue or proceed against either the promissor or some third person. It has been fruitful of litigation, especially to sustain actions against one voluntarily engaging to pay other people's debts. A promise to pay the debt of another man, like every other contract, must have a consideration to support it. Such a promise, if contemporary with the creation of the original debt, is of course sustained by the original consideration. If I trust a man for goods on the faith of your engagement to pay, the credit I give him is consideration enough. But if I have

already trusted, if he is now my debtor, then your promise to be answerable is a mere naked promise. An engagement on my part to forbear to sue, forms, however, a sufficient consideration. Forbearance to sue, after a cause of action shall have arisen, must necessarily be prejudicial to the party forbearing; it delays his proceedings; it may endanger his ultimate recovery: but an agreement to forbear to sue for a debt which is not yet due is equally good. The difficulty has been to settle in what cases the agreement to forbear was binding on the promissor or was void for its uncertainty. In one case it was held that a promise to forbear in general, without adding for any particular time, is to be understood as a total forbearance. Yet no objection was made on the ground that such a provision to forbear was not a valid consideration. Such an agreement for a valuable consideration would be tantamount to a covenant never to sue. In another case the promise was to *wait awhile*, and the Court said: "It is well settled that a general forbearance is to be intended a perpetual forbearance; but how far a forbearance not perpetual, but for an unspecified time is a valid consideration, is not so clear. It seems to be agreed there must be a substantial suspension of the right to sue, and therefore an agreement to forbear *for a short time*, or *for some time*, is insufficient, because such an agreement is so uncertain in its terms as not to stand in the way of a suit the next moment." Forbearance,

however, for a reasonable time, is clearly certain enough, and in all cases in which the question has arisen on a verbal promise, it has been for the jury to determine what was the forbearance intended. (1 Penna. Rep. 383.)

The term *further forbearance* as the consideration expressed in a written guarantee has been construed to mean forbearance for a convenient or reasonable time, taking into view in its computation as one element, the period which had theretofore been permitted to elapse without enforcing payment. (9 Watts & Serg. 51.) And he who promises to pay the debt of another in consideration of forbearance, is not liable to pay it, if the original debtor had been sued. (3 Watts, 213.) "It is not essential," says C. J. Gibson, "that the plaintiff should have *bound* himself to forbear or stay proceedings on the original security, so as to give an action for a breach of promise. Such an agreement would undoubtedly be a valid consideration, and might be so laid, according to the precedents in cases of mutual promises, which are reciprocally the consideration of each other, and which must therefore be simultaneous, concurrent, and equally obligatory; but when the consideration is not promise for promise, less than a positive engagement to do an act which, *when done*, is to be the meritorious cause of the promise, may be a sufficient consideration of it. A positive act is more evincive of the distinction than a negative one. If I promise

my neighbor to compensate him if he will do a specific act of service for me, and he does it in consequence, he may maintain an action, though he had not bound himself to do it. The consideration of such a promise belongs to the class called executory, the promise itself being in its nature conditional. But what if the defendant should desist, having performed the act in part? He would forfeit his interest in the promise; neither could he recover a *quantum meruit* (that is on an implied contract to receive what he reasonably deserved), and the parties would be where they began. But the promissor may have sustained damage or at least disappointment by the other's default. He undoubtedly may; but it is his folly not to guard against it, by exacting a mutual engagement, instead of making a conditional one, which leaves the party employed to earn the promised reward or not, at his pleasure. Now the condition of forbearance belongs to the executory class, and it differs in no particular from the instance put, except that the act is of a negative instead of an affirmative nature, and it is this negative nature, rendering as it does the motive of the act equivocal, that induces the mind to hesitate. It might be supposed from expressions which have fallen from judges, that a positive engagement to forbear was thought indispensable in all cases, but it is intimated in other places that actual forbearance at the instance of the defendant, may also be sufficient, on the principle that a single spark

of benefit received on the foot of the promise is a valid consideration. But in the actual state of our law on the subject, being without that part of the statute of frauds which is interposed for the protection of third persons elsewhere, policy dictates, in the absence of such an agreement, that clear and satisfactory proof be exacted that the request was in fact the exciting cause."

I am happy to say that such a legislative proviso as the Chief Justice here refers to, and which has so long been needed in this State, has been made at the last session of the legislature. It is enacted by the Act of 26th April, 1855, that "no action shall be brought, whereby to charge the defendant upon any special promise to answer for the debt or default of another, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person by him authorized." This act shall not go into effect until the first day of January, 1856, or apply to or affect any contract made or responsibility incurred prior to that time, or for any contract the consideration of which shall be a less sum than twenty dollars.

LECTURE II.

ON CONTRACTS OF SALE.

What is a Sale—Fairs and Markets Overt—Possession Title as to Third Persons—Sales in Fraud of Creditors—Delivery of Possession to Vendor must be Actual, Exclusive, Immediate, Continuing—Ship or Goods at Sea—In the Custom-House—At Storage—Judicial Sales—Assignees' Sales—Implied Warranty of Title—And that the Article is what it is sold for—No Implied Warranty of Soundness or Quality—Express Warranty—False and Fraudulent Representation—When the Contract can be Rescinded—When the Sale is Complete, and Property passes—Right of Property different from Right of Possession—Vendor's Lien for Price—Transmutation of Possession not necessary to pass Property—Identification of Goods, and Settlement of Terms necessary—Goods in the Process of Manufacture.

THE great business of the merchant is that of buying and selling. Upon his forethought and sagacity—upon his acquaintance with the character and supplies of different kinds of merchandise—with the extent, or probable extent of the demand—with the commercial character and standing of those with whom he deals—his success in a very large measure depends. A wise and well-balanced spirit of enterprise is the rare qualifica-

tion which he should aim to possess; and it is no easy matter to steer between a dull, plodding, and indolent habit of taking things just as they come, with which a man may scrape along and make a living on the one hand, and wild, reckless speculation on the other, which, after all, is nothing but gambling, and which, although it may be accompanied with occasional fortunate results, most generally, in the long run, is the road to ruin. It is in buying and selling that the moral principles of the merchant will be most severely tested. He will be strongly tempted to equivocate—to swerve from strict truth—to color and exaggerate. "It is naught, it is naught, sayeth the buyer: but when he is gone his way, then he boasteth." The converse of the proposition is true as to the seller. A high-toned morality condemns, as dishonest, all such tricks of trade as are intended, in plain language, to blind the eyes and mislead the judgment of those who are dealt with. A retail merchant, who enjoys the character of never palming off upon a customer an inferior or worthless article, of never having more than one fixed price, and that only the fair market price, is in an enviable position. He will gain the confidence of the community. His store will be preferred even to those who offer to undersell him. He may indulge a just pride in such a commercial character, and if he does not leave a large fortune to his children, he will leave them that which they will prize more, and which will be

more valuable to them; for what more powerful motive and incentive to honorable conduct in a young man, than the unspotted reputation of a parent, whose name he bears.

It is no answer to say that such practices in trade are prevalent. It is much to be lamented if such is the case. The general standard of morality in a country is indicative of its wealth and happiness. I would say it is almost an unerring thermometer. It is the interest of the merchants of a country to elevate this standard. It establishes its credit abroad. It gives them great facilities and advantages in the markets of the world. Not only ought they to frown upon and discourage all unfair and unscrupulous traders, but it seems to me that it would be best if they should everywhere seek to establish as rules of commercial integrity, if not as part of the law of the land, that a sound price should always imply a sound article. I am well assured that in the actual practice of the most honored and successful, such is the rule of action adopted and enforced as far as it can be by the code of public sentiment.

The most common and the most important of Commercial Contracts is the Contract of Sale. A sale is a contract for the transfer of property from one person to another, for a valuable consideration.

By such a contract in general, no more passes from the seller to the purchaser than the title of

the former. If his title is bad—if the property is not his—he can confer upon another no better right than he himself has.

In England and some other countries, sales in *fairs* or markets overt were held to be binding on all those who had any property in the thing sold, except in the case of stolen horses, which were subjected to particular regulations by statute. All the shops in London and Westminster were considered as markets overt. This efficacy of markets overt arose from prescription, and was part of the ancient common law. But in Pennsylvania there is no such ancient law or custom. On the contrary, the uniform determination of courts of justice have rejected such a usage whenever it has been relied on, and great inconveniences would arise from adopting it. It was considered that to protect the right of the real owner from the wrongful or unauthorized acts of third persons—to hold that he should not lose his property without his fault or consent—was a resolution founded in honesty and the soundest and best policy. It tends to the advancement of justice, to make men vigilant in the prosecution of felons, and it discourages persons from buying stolen goods, though in a market overt; for under that pretence men would buy goods there for a small value of persons whom they have reason to suspect. Persons, therefore, ought to be careful how they purchase personal property from strangers whom they do not know. It has been

expressly decided, that if a wagoner by whom goods are sent to be delivered to the consignee, sells them openly in the streets of a city, the sale vests no property in the purchaser. And so it is with goods intrusted by the owner to an agent, mechanic, servant, or common carrier, for the safe keeping, repair, carriage, or any particular duty in regard to the goods.

But there are some cases where a person is in possession, with the consent of the owner, under particular circumstances, calculated to deceive the world and impose upon purchasers. There the rule is different, and the title of the owner is divested by the sale. Thus, where a person is permitted to hold himself out as the owner, and deal with it before the public as his own,—as if the true proprietor were knowingly to permit another to exhibit the goods in a show case, together with other goods for sale—he would not be allowed to object that the seller was a mere depositary, and had no power of sale. So if a man were to send his goods to an auctioneer. A case of more common occurrence is when there is a sale, and the purchaser suffers the seller to remain in possession. As between the buyer and seller the property belongs to the latter; the transfer takes place as soon as the bargain is complete, and delivery is not essential to perfect it. This is so, however, only as between the parties. As to third persons it is otherwise. For if the seller transfer and deliver it to a new

purchaser, *bona fide*, and without notice, such new purchaser is entitled to hold it against the original vendee. So also when there is a conditional sale, accompanied with delivery of possession. Thus, if a man makes a contract to sell an article, the price to be paid at a future day or by instalments, but with a condition that the property is not to be changed until the price is fully paid, and delivers possession, although as between these parties the title remains in the seller, according to the terms of their agreement, yet if the vendee makes a sale and delivery to a person who is ignorant of the true state of the case, he will be able to make a good title. In other words, an executory agreement to sell, accompanied by the present delivery of possession in part execution of it, constitutes, as to third persons, a present and an unconditional sale, for the same reason that retention of possession defeats it where the intention is to pass the title at the time of the transaction.

It may be advanced, then, as a general rule, that wherever there is a contract of sale, executed or executory, the title as to third persons is considered to be in the person who has the possession.

This principle is extensively applicable in a class of cases of very common occurrence, and it is highly important that merchants and business men should be very familiar with it. It is very common for a man who is in debt to make a sale

of the whole or part of his goods to one or more of his creditors, in payment or as security for their debts: or he sells out his stock to some friend, who comes forward and agrees to assist him. The debtor, however, remains in apparent possession, or becomes agent, salesman, or clerk, and conducts the business as before. There is a formal delivery of possession; the old sign is taken down and a new one put up; a new set of books is opened, and the business is carried on by the old party in the new name. All this is of no avail. The property, notwithstanding the sale, remains subject to the execution of the creditors of the original owner. It may be seized and sold for his debts. Even when there is a *bona fide* debt as the consideration for the transfer—nay, even when there is a full and fair price paid in cash, and no actual fraud, unless there be an immediate, exclusive, and continued possession from the vendor to the vendee—wherever it can be done—the transfer is void, as against the creditors of the vendor. And this rule applies equally to mortgages or pledges as collateral as to absolute transfers. The delivery of possession must be actual, visible, and notorious. Symbolical delivery will not do where there can be actual delivery. Where the possession may be permanently changed by actual delivery of the thing, delivery of a part in the name of the whole or of anything else, or even of the thing itself, where it is afterwards taken back, is of itself a badge of fraud; because it is

apparent on the face of the transaction that the delivery was merely colorable, and that more might have been done to guard against deception. So, also, the possession delivered by the vendor and taken by the vendee must be exclusively in the latter—a concurrent possession will not suffice. "It is mere mockery," said Judge Duncan, "to put in another person to keep possession jointly with the former owner." (10 Serg. & Rawle, 419.) In one case the parties boarded together in the same house, and the horse which was the subject of the sale was kept in the same stable after as before the sale. The Court said: "The creditors of the grantor and the rest of the world unacquainted with the fact of the sale, had still reason to believe that he continued to be the owner of the horse, as the possession was *prima facie* evidence of ownership, and may therefore be presumed to have extended indulgence or credit to him on that account. Hence the law, in order to make sales of personal property good against creditors, and to prevent them from being deceived by appearances, requires that there shall be an actual transfer of possession, as far as the nature and condition of the property will admit of it. The circumstance of the seller and buyer of the horse here boarding together in the same house, furnishes no ground for dispensing with such actual change of possession as will render it distinct and visible, so that it may become notorious." (5 Wharton, 545.) The ordinary case

of a storekeeper selling out to his salesman or bookkeeper, will be seen at once to be a much stronger one. The delivery of possession must be immediate, at least as soon as it can conveniently be made. It must accompany the bill of sale. It is not sufficient to make a transfer of goods available against the creditors of the vendor that the possession be changed at the time the sheriff levies. In order to make the transfer good against the creditor's execution, a corresponding change of the possession must accompany the transfer, or follow it within a reasonable time afterwards—that is, as soon as the nature of the property or thing, and the circumstacces attending it, will admit of its being done. It has accordingly been held, that in order to vest a title in the purchaser to goods purchased in a retail store, it is necessary that they should be separated from the bulk of the other goods, and possession delivered with as little delay as is consistent with the nature of the articles purchased, otherwise the goods may be taken in execution as the property of the storekeeper. The possession must not only accompany the transfer, but it must continue in the vendee. If it be resumed after a time by the vendor, it will not be sufficient. To constitute a valid assignment of personal property, as against creditors, there must be a delivery to, accompanied and followed by a continuing possession in, the assignee. It is not sufficient that the assignor gives to the assignee a delivery sym-

bolical, constructive, or merely temporary, and then takes the articles back into his own possession and keeps and uses them just as he did before. This is not the possession in the assignee which the law requires. There must be not only a delivery of the thing to him at the time of the transfer, but a continuing possession, and that must be shown by the claimant.

There are, however, a few exceptions recognized to this general principle, which need here only to be briefly noticed. Such is where possession cannot be delivered, as in the case of a ship at sea. There, if the grantee takes possession as soon after the ship arrives in port as he conveniently can, it is enough. So in the case of goods shipped for a foreign port, the delivery of the bill of lading and policy of insurance will answer in the first instance, provided the claim of the assignee is followed up with reasonable diligence. A raft of lumber, floating in the river or moored to the wharf, is not the subject of a manual delivery. There should be, however, an open and public declaration in the presence of witnesses, or if there is a person in charge he should be changed. When the goods are in the custom-house stores, there should be a delivery of the certificate of storage, or an order on the stoor-keeper. So if the goods are bulky and stored in a separate place from the vendor's place of business, the delivery of the key will answer.

In one case the article was in the hands of a

mechanic, at the time, undergoing repairs. The Court said: "The property being in the hands of the bailee, the only possession was given of which it was susceptible. This is all that is required. Thus, nothing is more common than a transfer, by a principal, of goods in the hands of a factor, and no one doubts it is a valid transfer, subject only to any lien which the factor may possess. So a transfer of goods at sea, which are in possession of a master of a ship, is deemed a valid transfer, and if he refuse to deliver them, upon due demand and refusal, the vendee may maintain suit against him for the recovery of them or their value. In a case of bailment, the property passes when the sale is completed, and no formal delivery is necessary." (7 Barr, 89.) Another exception is in the case of a judicial sale. In such case the purchaser need not take possession, but may safely allow them to remain with the original owner, as whose property, the goods were sold. So the assignees under the Insolvent or Bankrupt Laws, and even assignees under a general assignment in trust for the benefit of creditors, may leave the property in possession of the insolvent, bankrupt, or assignor. In all these cases there is a public notoriety which dispenses with the necessity of an actual delivery of possession.

We have seen that in ordinary sales the vendor can transfer to the vendee no better title than he has himself. The security which the vendee possesses against loss, from the title proving defective,

is, that in every case of a sale of personal chattels in the possesion of the vendor, and when the contrary is not expressly stipulated, there is an implied warranty of title. The act of selling is such an affirmation of property, that, on that circumstance alone, if the fact should turn out otherwise, the price paid can be recovered back from the seller. And there is no distinction in this respect between the sale of goods of a tangible quality and of bonds, stocks, promissory and bank notes. Therefore, if one innocently sell or transfer for value a bank note, negotiable note, bond or other instrument which is forged, so that it is worthless in the hands of the transferree, the latter may recover back again the value given for it on the implied warranty of genuineness.

There is also an implied warranty that the article is what it is sold for; the article it is represented to be; and that even though the sale be by sample. Thus, where a person sold an article as *blue paint*, and it was so described in the bill of parcels, it was held to amount to a warranty that the article delivered should be blue paint, and not a different article. It is well settled, however, that with regard to the *quality* of goods the vendor is not answerable, unless he expressly warrant them, or there has been a false and fraudulent representation, an affirmation of a quality known by the vendor to be false. The rule is expressed by the phrase *caveat emptor*—let the buyer beware. His eyes are his market. And, though the seller is

answerable to the buyer that the article sold shall be in specie, the thing for which it was sold, yet, if there be only a partial adulteration, which does not destroy the distinctive character of the thing, the buyer is bound by his bargain, and in doubtful cases there is no practical test but that of its being merchantable under the denomination affixed to it by the seller.

But the rule of *caveat emptor* fitly applies only where the article was equally open to the inspection and examination of both parties, and the purchaser relied on his own information and judgment without requiring any warranty of the quality, and it does not apply to those cases where the purchaser has ordered goods of a certain character, or goods of a certain described quality are offered for sale without being open for examination, and when delivered they do not answer the description directed or given in the contract. If the article be sold by the sample, and it be a fair specimen of the article, and there be no deception or warranty on the part of the vendor, the vendee cannot object on the score of the quality. It amounts to an implied warranty that the article is in bulk of the same kind and equal in quality with the sample. If the article should turn out not to be merchantable from some latent principle of inferiority in the sample, as well as in the bulk of the commodity, the seller is not responsible. The only warranty is that the whole quantity answers to the sample.

As to what will constitute an express warranty of the quality of goods is a question of some difficulty. Perhaps no very definite rules can be laid down upon the subject. It is for the jury and not for the Court to decide how far words used in conversation on the sale of a commodity amount to an express warranty. And, although to constitute such a warranty requires no particular form of words, yet the naked averment of a fact is neither a warranty itself, nor evidence of it; in connection with other circumstances it may be taken into consideration; but the jury must be satisfied from the whole, that the vendor actually, and not constructively, consented to be bound for the truth of his representation.

It is important to observe that where there has been a false and fraudulent representation by the vendor the law unquestionably is, that the vendee may refuse to receive the article, and rescind the contract. The contract being vitiated by the fraud may be treated as a nullity. Or if the goods have been received before the fraud was discovered, he may tender back the articles, and if the price has been paid, sue to recover it back; or if it has not been paid, take defence on that ground in an action brought against him to recover the price. Or in the former case, where the price has been paid without tendering back, he may commence an action and recover damages commensurate with the injury for the deceit practised upon him. The same rule applies where there is a breach

of the implied warranty as to the kind or species of the goods, or where the bulk delivered or offered to be delivered, do not correspond with the sample. The purchaser may say, "This was not my contract—I did not buy these goods," and repudiate them altogether. But the case seems to be otherwise where there is a purchase with an express warranty of the quality. There being no fraud, and the goods without doubt being the goods bought, if the warranty is broken the vendee cannot insist upon returning the goods. In such a case there can be no rescission unless by the consent of both parties, or unless it was a part of the contract that if the warranty was broken the contract should be rescinded. The vendee may either sue on the warranty, or in case the price is not paid, take defence to an action brought against him to recover, and make a set-off in that action, of whatever damages he may have sustained by the breach of warranty.

In a case in the Supreme Court of the United States, that able and eminent jurist, Judge Washington, thus sums up the result of the decided cases upon this subject:—"If, upon a sale with a warranty, by the special terms of the contract, the vendee is at liberty to return the article sold, an offer to return it is equivalent to an offer accepted by the vendor, and, in that case, the contract is rescinded and at an end, which is a sufficient defence to an action brought by the vendor for the purchase-money, or to enable the vendee to

maintain an action for money had and received in case the purchase-money has been paid. The consequences are the same when the sale is absolute and the vendor afterwards consents unconditionally to take back the property; because, in both, the contract is rescinded by the agreement of the parties, and the vendee is well entitled to retain the purchase-money in the one case, or to recover it back in the other. But if the sale be absolute, and there be no subsequent agreement or consent of the vendor to take back the article, the contract remains open, and the vendee is put to his action upon the warranty, unless it be proved that the vendor knew of the unsoundness of the article, and the vendee tendered a return of it within a reasonable time." (12 Wheat. 193.) The Supreme Court of Pennsylvania have taken the same view of this subject. (10 Watts, 107.)

It is a very important question to determine when as between vendor and vendee a sale is complete, so that the property in the thing sold vests in the vendee and the price in the vendor. We have already seen that as to third persons in general there must be actual delivery of possession. But that is not necessary as between the parties. It is enough in general if the goods sold are identified so as to be distinguished from all others, the price and terms fixed, and the bargain complete. One thing shows the importance of this question. After the sale is thus complete, the risk of the goods is with the purchaser, so

that if they are destroyed by fire or tempest the loss is his. In the earliest reported case which we have in this State, the holder of a promissory note went to the shop of the maker and informed him that he came to take goods in payment. The debtor handed him such articles as he pointed out, naming the prices. The creditor marked those that he approved, and laid them aside, and then informing his debtor that he would go for a porter to remove them, he left the shop without receiving a bill of parcels or stipulating a time of payment or tendering the note. As soon as he had gone, the debtor closed his store, and the next morning executed an assignment of all his property in trust for the benefit of his creditors. The creditor brought an action against the assignee to recover possession of the goods. It was held that he was not entitled to recover. There is no argument of counsel nor opinion of the court, and we are left therefore to conjecture the ground of the judgment. (1 Dall. 171.) It is to be remembered, however, that the plaintiff in such an action has no title, unless he can show that at the commencement of the action he had a right to the possession. It is evident that until tender of the promissory note, the purchaser had no right to the possession. When nothing is said, every sale is by implication a sale for cash. It is not said in the case that the note was tendered either to the defendant or to the assignee before suit brought. If this were not done, we can easily understand

why the plaintiff failed. When the terms of sale are agreed on, and the bargain is struck, and everything that the seller has to do with the goods is complete, the contract of the sale becomes absolute without actual payment or delivery, and the property and the risk of accident in the goods vests in the buyer. He is entitled to the goods on payment or tender of the price, and not otherwise, when nothing is said at the sale as to the time of delivery or the time of payment. The payment or tender of the price is in such cases a condition precedent implied in the contract of sale, and the buyer cannot take the goods or sue for them without payment; for though the vendee acquires a right of property by the contract of sale, he does not acquire a right of possession of the goods, until he pays or tenders the price. But if the goods are sold upon credit, and nothing is agreed upon as to the time of delivering the goods, the vendee is immediately entitled to the possession, and the right of property vests at once in him; though the right of possession is not absolute, but is liable to be defeated if he becomes insolvent before he obtains possession, as will presently be explained. The sale is complete when the terms are either certainly fixed or a rule adopted from which they can be ascertained by measurement or calculation, and when the subject-matter of the sale is definitively and certainly ascertained and distinguished.

"A sale," says Judge Rogers (2 Watts & Serg. 9), "is defined to be a transmutation of property

from one man to another in consideration of some price or recompense in value. When the name of the vendee is written by his direction, or by the direction of his agent, on the article sold, or the goods are made up to be delivered, or are otherwise separated from a larger quantity of which they formed a part, with a view to deliver, or where the vendee by the consent of the vendor, deals with the property as his own, it has been construed to be evidence of a delivery so as to enable the vendor to maintain an action for the price as of goods actually sold and delivered. A man buying a hat selects the article which suits him; it is put aside, but for some reason it is inconvenient for him to take it with him. He is to send for it, or the vendor is to send it to his lodgings. From that moment there is a change of property; the bargain is complete, and the vendee becomes the owner." In a recent case which was decided by the Supreme Court of this State, there was a sale of 350 hhds. of molasses, and 25 hhds. of rum—set apart in a shed—the whole to be ganged at the vendor's warehouse, by a person, who was designated and named, and the price also to be fixed by him. The vendor told the vendee to mark the hhds., which was done. The sale was in consideration of an antecedent debt secured by promissory notes. The notes were tendered. It was held that the bargain was complete—the property passed—and the vendee was entitled to recover the possession. "The subject of the sale was sufficiently certain. The rum was

in a shed by itself, and the rows of hhds. containing the molasses were particularly designated. Even without such designation, the lot would have been sufficiently ascertained by the marking pursuant to the vendor's direction. A sale of articles to be selected by the vendee is certain enough after selection made. The point of the case was, however, to determine whether the vendee was at liberty to stop short before the contract was made complete in all its parts by the ascertainment of the quantity and price, through the agency of him to whom the gauging and valuation were referred. If I deliver a chattel on terms that the price of it be subsequently fixed by the vendee and myself, I may balk the contract by insisting on more than he will be willing to give for it, and thus regain the possession of my property, with which I had parted only conditionally. But though the price be not settled by the parties, yet if they agree on a method of settling it irrespectively of anything to be done by themselves, it is the same between them when subsequently settled, as if the sum to be given had been an original condition of the bargain; but if the person to whom the naming of it was referred die in the meantime, or refuse to act, the contract is at an end. Such a sale is conditional, but not executory, like a contract to sell at a day to come, which is complete in itself, though some act remain to be done in pursuance of it; on the contrary, it is a contract which, being imperfect in itself as regards one of its

terms, is to take effect only when the deficiency is supplied by the performance of a condition precedent, the prevention of which, by an act of Providence or the obstinacy of the agent, defeats the sale entirely. Nor does the property pass by it in the first instance, for the sale being on a condition precedent, does not allow the title to vest before the condition has been performed; and, therefore, if the vendor sell the thing again in the meantime, the second purchaser will take it clear of dispute, though the vendor will be answerable in damages, when the price is named." It is to be observed that in the case just adverted to, the rum and molasses were to be gauged and the price determined at the purchaser's warehouse, an act that was prevented by the vendor's retention of the property in his actual custody. It is a principle that in all cases prevention is equivalent to performance. That is, where one of the parties to a contract prevents by his own act or default the other party from doing that which he has agreed to do or to have done, it is so far as that party is concerned the same thing as if it actually was done. The jury then must determine what was the quantity as near as the evidence would allow them to come at it, and what was a reasonable price. These were the grounds upon which that case was decided. (3 Watts and Serg. 14.) In a subsequent case the facts were—The vendor's agent sold to the agent of the purchaser a raft of boards at a certain sum per thousand

feet, and delivered it to a person employed by the latter to take it, at the purchaser's expense and risk, from Richmond, on the Delaware, to a place on the Schuylkill, where it was afterwards moored. Before, however, the boards were counted, a heavy freshet in the river carried the raft away. It was held that the sale was complete, and that the purchaser was responsible for the price. There was in this case an unconditional delivery. Had there been no delivery, or a conditional one, the purchaser would not have been bound, till the number of feet and entire price had been ascertained; but the parties evinced by taking the last step—delivery—that nothing remained to be done in order to perfect the contract. If I deliver a chattel, in execution of an agreement to sell it on terms to be fixed subsequently, the ownership and risk of the property doubtless remain with me in the meantime; but such a delivery is conditional, and after an ineffectual effort to perfect the sale, no delivery at all. On the other hand, it is a rule perhaps without an exception, that whenever there has been an absolute delivery pursuant to a bargain, perfect in its members or capable of being made so by reference to something else than supplemental conditions by the parties, or an arbiter appointed by them, the ownership of the property is vested by it. A sale may be fatally defective in its members, and it is said that by the civil as well as the common law, the specification of a price is necessary to constitute

it. But there is abundant authority to show that it may be supplied by arbitrement, when there is a provision in the contract for it. Surely the price is certain enough when the sum of it can be obtained by computation. A sale is imperfect only when it is left open for the addition of terms necessary to complete it, or when it is deficient in some indispensable ingredient, which cannot be supplied from an extrinsic source. But when possession is delivered, pursuant to a contract which contains no provision for additional terms, the parties evince in a way not to be mistaken, that they suppose the bargain to be consummated. Even when actual possession has not been taken, the ownership and risk pass by the contract, if nothing remains to be done to the property by the vendor, such as counting, measuring, weighing, or filling up, to ascertain the number, quantity, or weight. (6 Watts and Serg. 357.)

Even, however, if the price be not agreed, if there has been an actual or even a constructive delivery, the sale is complete—the property and risk are with the purchaser, and he is liable upon a contract which the law in such a case implies to pay for the articles, whatever they may be reasonably worth at the market rate, at the time of delivery. It is not the law that the right of property in a chattel cannot pass by a sale, so long as the quantity, and consequently the price of the thing sold, remain to be ascertained. It is only when something is to be done for the ascertain-

ment of the quantity, *by the very terms of the contract*, that it is incomplete. (3 Barr, 50.)

One thing is, however, absolutely necessary, and that is, that the subject-matter should be perfectly identified, ascertained, and designated, so as to be distinguished from everything else. If a man sells a hundred barrels of flour out of his storeroom—or a hundred pieces of cloth—even though the price and all the terms are fixed and the price is paid—no property in any particular barrels of flour or pieces of cloth vests in the purchaser. Until they are marked or set aside, they belong to the seller—if destroyed, the loss is his, even though the entire mass from which they were to be taken should be destroyed, and even if there should be no difference in quality or kind so as to make a selection necessary. Smith, we will say, being the owner of one hundred and twenty-five barrels of molasses, sold one hundred barrels to Jones, but at Jones's request permitted them to remain in his cellar. The barrels were not separated or marked, nor were any particular barrels agreed upon. Jones sold them to Black, and offered to turn them out and gauge them, but Black requested they might still remain in the cellar, and nothing further was done. The goods were destroyed by fire. It was held that the property had not passed. "The fundamental rule which applies to this case," say the court, "is that the parties must be agreed as to the specific goods, on which the contract is to attach, before there can

be a bargain and sale. * * * The civil law consistently declares that there cannot be a perfect sale until the price is fixed in money, though everything else is ascertained, and consequently that a contract to sell the whole of a particular parcel of goods, at a price depending upon the number, weight, or measure of the goods, will not be a sale until the goods are numbered, weighed, or measured, for till then the price is not fixed in money. The contract, on the part of the vendee, was complete, for he was to transfer a specific, ascertained thing in the state in which it then existed; but the consideration was not a fixed sum in money till the number, weight, or measure was ascertained. This was a defect in the sale according to the principles of the civil law, but it is hard to see why it should prevent the contract amounting to a bargain and sale in the English law. (We have seen that by that law, if the sale is complete in other respects, and there has been either an actual or constructive delivery, the purchaser is liable for the market price.) In many cases the weighing may be necessary to ascertain the specific goods; in others, it may be necessary to put the goods in a deliverable state, and in these cases the reasons are as applicable to the English as to the civil law. * * * The rule is now too firmly settled to be shaken, that the goods sold must be ascertained, designated, and separated from the stock or quantity with which they are mixed, before the

property can pass. Until this be done, it remains the property of the vendor, and if destroyed by fire or otherwise, it is the loss of the vendor, and not the loss of the vendee. It is difficult, on any other principle, to answer the inquiry on whom the loss would have fallen, had part only of the molasses been destroyed. (If one hundred of the one hundred and twenty-five barrels were the property of the buyer, and twenty-five of the seller—suppose only twenty-five barrels had been burned, whose twenty-five would it be right to say they were.) If a person purchases cloth from a merchant for a coat, not to be cut off until the tailor be sent for, and in the intermediate time the store and its contents are burnt by fire, there would be but one opinion that the loss must fall on the seller, and not on the buyer." (7 Barr, 140.)

If the vendor rely on the promise of the vendee to perform the conditions of sale and deliver the goods accordingly, the right of property is changed, although the conditions be not performed. But when performance and delivery are understood by the parties to be simultaneous, possession obtained by artifice and fraud will not change the property. Thus, where goods were sold to be paid for by purchaser's note, and a porter was sent with the goods and directed to obtain the note, but the purchaser prevailed upon the porter to leave the goods upon a promise that he would call himself and give the note, which he afterwards refused to do: it was held that no

property passed, and that the seller could recover the possession. (3 Serg. & Rawle, 20.)

One other class of cases will close this topic. It is as to the property in goods which are in the process of manufacture. In general it may be laid down that until the article is finished and actually delivered, no property passes. A. contracted to sell to B. a quantity of hides and skins, then in the vats of the vendor undergoing the process of tanning, but which were then capable of being removed, to be delivered at a subsequent day named, some of them at fixed prices and the rest at the market prices: it was held that no property passed. "The distinction," said C. J. Gibson, "between a sale which transfers the ownership and an agreement to sell and deliver at a day certain, which gives but an action for the breach of it, is a broad and distinctly understood one, and practically observed in the current transactions of business; and I am at a loss to see how its effect can be evaded in a case like the present. Every agreement for a subsequent delivery is essentially executory. The theory of those who maintain that the title passes in the meantime is, that the artisan remains in possession but as the servant of the customer, the labor and materials to be added by him being the subject of a separate compensation; consequently, that there is, in fact, a present execution of the contract. In point of policy this would evidently be objectionable, because no purchaser of a finished article, in the

usual course, would be secure of the title, and in point of reason it is forced and unnatural, because it is founded on an hypothesis false in fact, that the value of the article in its unfinished state is the basis of the contract. Was it so considered in the present case, or in any other to be found in the books? The parties dealt expressly in reference to the price, which the leather would fetch when fit for the market; and having treated in reference to a future condition of the article, a future price and a future delivery, the contract was necessarily executory, as every sale of an unfinished article must be when not sold and delivered as such. Unquestionably the property in an article made to order passes but by the delivery of it, because at the time of the order, which is the date of the contract, there was no property in anything to pass; and it will scarcely be pretended that the accidental existence of a part of the work would give the customer a specific right to the whole. For instance, an order to finish a coach, whose parts were sufficiently formed to individuate it as a whole, would be obnoxious to the objection just stated, as regards specific property in the labor and materials to be added, and it would not vest a specific property in the work on hand, because it was not that but a finished work which was the subject of the contract. * * * But even had they contracted for the article at the value of it in its unfinished state, the consequence would have been

the same; for no form of dealing will turn what is essentially executory into a contract executed." (4 Rawle, 260.) It seems hardly necessary, however, to add that the vendee of a manufactured article to be delivered when completed, who agrees to take it in its unfinished state, makes a new contract, and possession being delivered thereunder the title is complete. If the parties consent to abandon the original contract and pass the article in an unfinished state on their own terms, the vendor is in a condition to execute the contract immediately, and he does so when he delivers it in satisfaction of the new arrangement. Nor will any of my hearers mistake the case we have been considering for that where one man furnishes materials to a manufacturer or mechanic, on a contract, to work them up and deliver a finished article. Then, in all its stages, the article is the property of him who furnishes the materials —the mechanic has no property in it—he has a lien for the contract price of his work, which will enable him to retain the possession until that is paid, but when it is paid or tendered, he has no longer any right to the possession.

When, however, the sale is complete and the title vested in the buyer, it is still in the power of the seller to reclaim the possession of the goods in case of the insolvency of the purchaser, provided they have not come to his actual possession. This is called the vendor's right of *stoppage in transitu* during the carriage. It does not proceed

upon the ground of rescinding the contract. It assumes its existence and continuance, and as a consequence, the vendee or his assignees may remove the goods on payment or tender of the price, notwithstanding they have been stopped, and the vendor may sue for and recover the price, notwithstanding the stoppage, provided he be ready to deliver the goods upon payment. If he has been in part paid, he may exercise the right for the balance. There must be actual payment of the whole price, before the right to stop *in transitu*, in case of failure of the vendee, ceases. Though a bill or note has been taken and indorsed away for the price, even that will not destroy the right. This right is so strongly maintained that while the goods are on the transit and the insolvency of the vendee occurs, the vendor may take them by any means not criminal. It is not necessary, however, that he should obtain actual possession of the goods before they come to the hands of the vendee; nor is there any specific form requisite in which to exercise the right. A demand of the goods of the carrier, or notice to him to stop the goods, or an assertion of the vendor's right by an entry of the goods at the custom-house, or a claim of the possessor, whoever he may happen to be, is equivalent to an actual stoppage of the goods, and vests the vendor with the right to recover possession.

The most important and difficult question is to determine when the *transitus* or carriage is at an

end. If the delivery to a carrier or agent of the vendee be for the purpose of conveyance to the vendee, the right of stoppage continues, notwithstanding such a constructive delivery to the vendee: but if the goods be delivered to the carrier or agent for safe custody or for disposal on the part of the vendee, and the middle-man is by the agreement converted into a special agent for the buyer, the transit or passage of the goods terminates, and with it the right of stoppage. In short, it continues until the place of delivery be in fact the end of the journey of the goods, and they have arrived to the possession or under the direction of the vendee himself. The idea that the goods must come to the corporal touch of the vendee is exploded, and it is settled that the *transitus* is at an end, if the goods have arrived at an intermediate place, where they are placed under the orders of the vendee. Delivery to the master of a general ship, or of one chartered by the consignee, is certainly as between vendor and vendee a delivery to the vendee or consignee himself, but still subject to the right of stoppage. And yet if the consignee had hired the ship for a time, and the goods were put on board, not to be conveyed to him, but to be sent on a mercantile adventure, the delivery would be absolute, as much as a delivery into a warehouse belonging to him, and it would prevent the right of stoppage. So it has been ruled by the Supreme Court of this State, that if goods are shipped on credit in a foreign

port, on board the consignee's own ship, the master of which signs a bill of lading, by which they are to be delivered to his owner, the *transitus* is at an end by delivering the goods to the master; and the consignor cannot afterwards stop the goods in case of the insolvency of the consignee before their arrival. "To whatever principles," says the Court, "the right of stoppage *in transitu* be referred, it is plain, that if the goods be once actually delivered into the possession of the consignee or purchaser, the property is thereby absolutely vested in him. It is the same if the delivery be to his servant or correspondent authorized by him to receive the goods; for the possession of either of them is in law a delivery to the consignee himself. The question always is, whether the party to whom the goods actually came be an *agent*, so far representing his principal as to make the delivery to him a *full, effectual, and final* delivery to the principal, as contradistinguished from a delivery to a person virtually acting as a carrier or means of conveyance, to or on account of the principal in a mere course of transit towards him. * * * The relation of master of a ship is that of a special agent to his employer. He so far represents his principal, as to make a delivery to him (in the absence of a special agreement to the contrary), a full, effectual, and final delivery to the principal himself. The master of the ship (remember they are speaking of the case of a ship owned and a master appointed by the consignee)

cannot with any propriety be considered as a common carrier or mere middle-man between the consignor and consignee. Every connection between the vendors and the agent was at an end, and the agent became alone answerable to his employer. Nor had the agent any demand against the vendors. Not so in the case of a common carrier, who, for certain purposes, is considered as the agent of both parties, and against whom, in certain cases, either the vendor or the vendee would have a right of action. So also in the event of the insolvency of the vendee or refusal to take the goods, a common carrier would have an action against the vendor for his freight. So much is the master considered as the special and exclusive agent of his employer, that in no case would he have been justified in a redelivery of the goods to the vendors. This being the law, it is a difficult matter to distinguish such a delivery from one made in a man's warehouse, particularly if the warehouse be not at the place of his abode." (1 Rawle, 9.) So the same Court have decided that when goods shipped to a vendee arrived at their port of destination, and the vendee paid freight and gave his note for the price, but the goods, in consequence of the loss of the invoice, were stored in the custom-house—no entry or payment of duties being allowed by the custom-house regulations, without the production of the invoice—and remained there until the note given for them was dishonored, and the vendee failed

and made an assignment in trust for the benefit of his creditors—the vendor's right of stoppage remained. The goods were in the custody of the officers of the law. Until they were entered, the right of the vendee was not recognized, and could only be so on presentation of the original invoice. The loss of the invoice did not vary the case. The objection still continued. The vendee had not entitled himself to the actual possession, and whether this arise from storm at sea, by which the delivery of the goods were delayed, from accident, carelessness, or any other cause, it was useless to inquire. The right of stoppage *in transitu* is much favored; for, as is said, it is unreasonable to allow the goods of the vendor to be appropriated to the payment of other creditors, if the vendee fails before payment and before the goods have actually reached him. (7 Barr, 301.)

A general assignment by the vendee will not defeat this right of the vendor. Nor does a resale of the goods by the vendee. But if the vendor has given or transmitted to the vendee, documents sufficient to transfer the property, and the vendee upon the strength of them, sells the goods to a bona fide purchaser without notice, the vendor will be divested of his right. An indorsement of the bill of lading will defeat the right of stoppage. A resale, without such indorsement, will not. The rule is founded on sound principles of mercantile policy, and is necessary to render the consignee, who holds the bill of lading, safe

in the acceptance of the drafts of his correspondent abroad, and to afford him the means of prompt reimbursement and payment. A bill of lading to this end, must have so far the characteristics of negotiable paper, that upon the faith of it the consignee may be able to raise money in the market, which he could not do if it were liable to be defeated subsequently, by the contingency of the failure of the consignee. If the assignee of the bill of lading has notice of such circumstances as render the bill of lading not fairly and honestly assignable, the right of stoppage as against the consignor, is not gone: and any collusion or fraud between the consignee and his assignee, will of course enable the consignor to assert his right. But the mere fact that the assignee has notice that the consignor is not paid, does not seem to be of itself absolutely sufficient to render the assignment defeasible by the stoppage of the goods in their transit, if the case be otherwise clear of all circumstances of fraud; though if the assignee be aware that the consignee is unable to pay, then the assignment will be deemed fraudulent as against the rights of the consignor.

The buyer, if he finds himself unable to pay for the goods, may, before delivery, rescind the contract with assent of the seller. But this right of the seller and buyer subsists only while the goods are *in transitu*—as far as creditors of the buyer are concerned, where a bankrupt law exists. But

when there is no such law—even after delivery—the buyer and seller, either on account of the inability of the buyer to pay, or for any other good reason, may rescind the contract and restore the goods, provided the buyer has not in the meantime made a general assignment, or his creditors have not levied an execution.

LECTURE III.

ON MERCANTILE PAPER.

Specialties and Parole Contracts—Assignability of Choses in Action—Assignment of Bonds—Title of Assignee subject to Equities—Assignor a Guarantor of the Validity of the Bond, but not that it will be Paid—Bill of Exchange—Promissory Note—Consideration Presumed—Assignability—Negotiability—Bills and Notes must be Absolute, and for Payment of Money—Property Orders and Notes—Form of Bill or Note—Note Drawn on Fund—Drafts on Government—When Holder Protected against Equities of the Original Parties—When a Holder is bona fide and for Value—When He may be called on to show his Bona Fides—Transfer of Note in Payment of or as Collateral Security for Precedent Debt—Newspaper Notices—Notes for Gambling Debts—Demand of Payment—Where and When—Days of Grace—Bank Checks—Notice to Drawer and Indorser—Giving time to Prior Parties—Protest of Notary Public.

THE distinction between Specialties and Parole Contracts has been heretofore adverted to. All contracts not evidenced by writing under seal are Parole Contracts, whether resting upon written or oral testimony. There are, however, some mercantile contracts required to be in writing in order to affix to them their commercial incidents and character—such as bills of exchange and pro-

missory notes. Bonds or specialties have of late years multiplied so much in business, principally through the multiplication of corporations, who have issued their obligations under seal, that it is necessary to premise what may be said of bills of exchange and promissory notes by a condensed statement of what is settled as to bonds. It will form the natural introduction to the consideration of that class of instruments, which are properly styled negotiable paper.

That which distinguishes a specialty from a simple contract is its seal. Nothing can supply its place. It may be nothing but a scrawl of ink attached to the name, but still something intended for a seal must be there. If the party says, "Witness my hand and seal," still if in fact there is no seal, it is not a specialty. As between the parties, the seal always implies consideration. It is no defence for the obligor to say he received no consideration. The delivery of the bond is a gift of the money, expressed in it, which the donor cannot revoke. Creditors may attack the validity of the instrument, as they can any other voluntary disposition of property, by showing that the obligor was indebted at the time, and therefore had no right to give. If the party himself alleges that the instrument was obtained from him by fraud, he may give in evidence the want of consideration as an element in the decision of that question. Failure of consideration is a different thing. In equity that is a defence. Where the

instrument was not intended to be a gratuity, but a consideration was in the contemplation of the party to be received, if for any reason that consideration fails, it is inequitable to enforce the agreement.

By the principles of the common law, no mere claims for money, or, as they were termed, choses in action, were assignable. Still, however, in process of time, such assignments were recognized. The assignor was treated as a trustee for the assignee, and the latter had a right to use the name of the former to recover the claim. Bonds were, in this respect, like all other contracts. By an Act of Assembly of Pennsylvania, passed in 1715, they were made legally assignable, provided such assignment was made under hand and seal, and in the presence of two or more credible witnesses. In order, however, that bonds may be thus legally assigned, so as to vest the title to sue in his own name in the assignee, they must be expressly made payable to order or assigns, and be for the payment of money. A bond with a special condition—such as of indemnity—cannot be thus assigned. Notwithstanding, however, this act, bonds and other contracts may be assigned as before. Such assignments are termed equitable, to distinguish them from assignments under the Act of Assembly, which are called legal. An assignment, though not in all the forms of law, vests the equitable interest in the assignee, and the assignor will not afterwards be permitted

to exercise any authority over the property assigned. It is indifferent whether the equitable assignment be in writing, by parole, or by the mere delivery of the muniments or evidences of right. There may be a valid gift by delivery without consideration. When, however, there is no actual delivery of the bond, an assignment, not under seal, and without any valuable consideration to support it, vests no title either at law or in equity in the assignee. An equitable assignment is a declaration of trust with an agreement to permit the assignee to sue in the assignor's name. The contract being consequently executory, must have a consideration to support it, without which equity would no more execute it than the law would make the breach of it a subject of compensation.

The assignment of a bond, whether made according to the Act of Assembly or not—whether legal or equitable—like the assignment of any other debt, carries with it all the securities possessed by the assignor—whether named or known at the time or not. But the legal assignment of a bond does not thereby pass the legal title to any collaterals held with it. To have benefit of them the assignee must still use the assignor's name.

The only object of the Act of 1715, was to enable the assignee to sue in his own name. It was not to render a bond a negotiable instrument, like the bill of exchange or promissory note—that is, it was not to give the assignee any better right

than the assignor had. Hence, it is well settled that the assignee of a bond takes it at his own peril, and stands in the place of the obligee, so as to let in every defence and defalcation, which the obligor had against the obligee *at the time of notice of the assignment.* If the obligor pays the bond to the original obligee after the assignment, but before notice of it, that will be a good defence to an action brought by the assignee. So it is a good defence that the obligor before he knew of the assignment, and before the bond became payable, had been obliged to pay money on account of the obligee. If, however, the assignee is induced to take the bond by the obligor's promise to pay it, or his declaration that he has no defence, or by his silent acquiescence in the assignment without giving notice of his defence, he will be precluded from afterwards setting it up, even if the obligor was ignorant at the time of his having any defence; and that, even where the representation was not made directly to the assignee, but was a declaration to a third person, afterwards communicated to the assignee. But the admission or declaration must have been made before the assignment, so that the assignee acted on the faith of it. Admissions made by the obligor after the assignment, though they are evidence against him, will not conclude him. It is prudent and proper, therefore, whenever an assignment of a bond or book debt, or other claim, is agreed to be made—1. Before taking the

assignment to call on the obligor, and get an admission from him in writing, or in the presence of witnesses, that he has no defence; and 2. Immediately on the execution of the assignment, to give notice to the obligor, or original debtor, of the fact.

An assignment of a bond is not like the indorsement of a bill or note, an undertaking that the bond will be paid. It is, however, an undertaking that the bond is good, that he has a good title to recover, but not that the obligor is solvent or will pay it.

A bill of exchange is a written order or request from one man to another, directing or requesting him to pay a third person, therein named, a sum of money. The person who draws the note is called the drawer—the person upon whom it is drawn is called the drawee, and if he accepts, the acceptor—the person to whom the money is to be paid the payee.

A promissory note is a written promise to pay a sum of money to a person named in it. The promisor is called the maker—the promisee the payee of the note.

We have seen that in specialties the seal imports consideration. In all simple contracts not under seal, a consideration must be alleged and proved. But in bills and notes, the instruments are themselves *prima facie* evidence of consideration—that is, the law presumes it, and it need not be proved in the first instance. But still this

presumption may be rebutted; and it is a good defence to the maker of a note, to prove that there was no consideration when he is sued by the payee.

Bills and notes have another peculiarity. When the payment is directed to be made to the payee, or to his order, or to bearer, the note is legally assignable by the Commercial Law. If drawn to order and indorsed, or if drawn to bearer then without indorsement, the assignee or holder has the legal title, and can sue and recover in his own name. This is called assignability.

But they have still another peculiarity. We have seen that upon an assignment of a bond, book-debt or other chose in action, the assignee is in no better position than his assignor. If there was any defence or set-off against the creditor, it is still available against the assignee. When, however, a note which is assignable by the words order or bearer, is assigned before it arrives at maturity in the usual course of business, and for a valuable consideration, the assignee has a better title than his assignor. No defence or set-off between the original parties is available as against him. This is called *negotiability*.

There is still a third peculiarity. We have seen that the assignor of a bond or debt does not undertake that the debt will be paid. He undertakes that it is due, he impliedly warrants the title, and so does every man who sells or assigns a bill or note, whether he puts his name on it or

not. But the payee or other holder who assigns a bill or note by putting his name upon it, unless he qualifies his indorsement by the words "without recourse," or some such words, becomes responsible to any person, who may afterwards become the holder, that the bill or note will be paid at maturity, and if not paid by the party who ought to pay it, is bound to pay it himself. This is not indeed an absolute engagement, but is conditional, and depends upon the holder demanding payment and giving notice of the dishonor in due time.

In order that these peculiarities may attach, the bill or note must have no seal. It has been decided that an instrument in the form of a promissory note, issued by a bank, with the corporate seal on its face, is a specialty, and that an indorsement in blank by the payee does not make him liable as the indorser of a negotiable note. In like manner it has been expressly held that it is subject in the hands of the holder to whatever defences might have been made against the original payee, though he may have purchased it in the market before it was due, for a valuable consideration and without notice. It is very important that this simple rule should be borne in mind.

It is necessary, too, that the instrument, whether bill or note, should be simply for the payment of money, and that absolutely and without any contingency. Thus a bill or order drawn

by A. or B. payable to bearer for $350 worth of dye-stuffs, and accepted by B., was held not to be a negotiable instrument, and the holder was not permitted to sue in his own name. So it has been ruled that an accepted order for the delivery of goods requires a consideration to make it binding on the drawer, before a delivery pursuant to the order without notice. The drawer, in other words, is not liable to an action on such an order without proof of consideration. "The idea of commercial exchange," say the Court, "has never been applied to property other than money. It does not embrace orders or notes payable in goods or produce. Consequently upon such paper *per se* commercial usage has not rendered the drawer or indorser liable, and he cannot be sued upon it. The holder is therefore thrown back upon the general law of contracts, and to establish an obligation on the drawer must show a special undertaking with its necessary incident of consideration. * * * A bill of exchange being a draft upon a fund presumed to be in the hands of the drawee, always imports a consideration sufficient to support the contract springing from the simple acceptance of negotiable paper. The party was merely the holder of an order for goods to be manufactured, which the drawer had agreed to honor. But this agreement did not of itself show a consideration, and there was no proof of one distinct from it. * * * Nothing is clearer than that such an acceptance (without consideration) cannot

be enforced by suit. The acceptor of a property order, as it has sometimes been called, can only be made liable upon his special undertaking, of which, to be sure, as in the case of bills of exchange, his acceptance may be regarded as proof, but like other contracts it requires a consideration, and unlike bills or notes proper, this must be shown independently of the mere fact of acceptance. The acceptance may be received as tending to show a contract, but it will not *propria vigore* make one." (10 Barr, 170.)

The promise to pay must be simple and direct. A bill or note, to be sure, is not confined to any set form of words. A promise to deliver or to be accountable or to be responsible for so much money, is a good bill or note, but it must be exclusively and absolutely for the payment of money. An instrument of writing was issued by a bank, signed by the cashier in this form: "I hereby certify that A. B. has deposited in this bank, payable 12 months from date, with five per cent. interest till due, a certain sum of money for the use of C. D., and payable only to his order upon the return of this certificate." It was held that C. D. was not liable on his indorsement as upon a bill or note. It was a special agreement to pay the deposit to any one, who should present the certificate and the depositor's order. Nothing is a promissory note in which a promise to pay is merely inferential, or in which there is no more than a simple acknowledgment of the debt, with

such a promise to pay as the law will imply. Though the word payable were taken for an express promise—still it was not an absolute and unconditional one. It was required that the certificate should be returned. Had it been contemplated that the ownership of the deposit should be transferable only by indorsement of the certificate, like that of a promissory note, such condition would have been useless; for the indorsement would have been inseparable from the certificate, and could not have been presented without it; but not so a check, to which the provision was intended to apply. It was doubtless understood that the ownership of the deposit might pass indifferently by check or indorsement; and it was doubtless to provide against inconsistent transfers, and consequent embarrassment of the bank as a stake-holder between antagonist claimants, that a condition was introduced which was as foreign to the terms of a promissory note as would be a condition to pay out of a particular fund. (6 Watts & Serg. 227.)

It is essential that the bill carry with it a personal credit, and that it be not confined to credit upon any future or contingent event or fund. The payment must not rest upon any contingency, except the failure of the general personal credit of the person drawing or negotiating the instrument. It would perplex the commercial transactions of mankind, if paper securities of this kind were encumbered with conditions and contingen-

cies, and if the persons to whom they were offered in negotiation were obliged to inquire when those uncertain events would probably be reduced to a certainty. And hence it is that an order or draft drawn upon the government or any of its departments—as by a mail contractor upon the Postmaster-General—is not a negotiable bill of exchange. "It is an indispensable element in the constitution of these instruments, that there should be an absolute and entire freedom from contingency of payment depending upon the happening of an event or the solvency of a fund. But every bill on government is drawn on a fund, whether it be so expressed or not. It is a matter of public notoriety that government accepts for no more, and is bound for no more, whatever be the form of acceptance, than it has in its hands; and that it treats a bill drawn on it as no more than an assignment or order of transfer. * * * The public officers may doubtless draw or accept bills to facilitate the business of their departments, but they would transcend their power did they attempt to pledge the responsibility of the government as a merchant or a banker in the money market." (2 Whart. 233.) But the statement of a particular fund in a bill, if introduced merely as a direction to the drawee how to reimburse himself, will not vitiate it: thus a bill directing the drawee to pay A. B. so much as the drawer's "quarterly pay," was held to be a good bill.

An instrument in itself not negotiable may,

however, become so by special indorsement. Thus in the case of an ordinary due bill, or simple acknowledgment of indebtedness, when it was specially indorsed by the payee "pay A. B. or order"—it was held that by the effect of this indorsement it became as between the indorser and holder an inland bill of exchange, in which the indorser stood in the light of a new drawer of a bill payable to the order of the indorsee, and the holder, by taking it in this character, took it subject to all the rules that regulate the relation between indorser and indorsee in negotiable instruments.

The next inquiry which most naturally arises is, in what cases may the original consideration or matter of set-off or defence as between the original parties be set up against the holder of negotiable paper? The holder in all cases, in order to avail himself of the advantage of the mercantile rule, must be *bona fide*, and have received the paper in the usual course of business and for a valuable consideration. The fact that notes are so frequently made between parties without consideration—commonly called *accommodation notes*—makes this practically one of the almost constantly recurring questions upon this subject. Hence the importance that it should be accurately understood.

The first important point to be noticed is that *prima facie*—in presumption of law—every holder is a holder *bona fide* and for value. The burden

is upon the party alleging the contrary to prove that he is not. There is but one exception to this, and that is where a bill or note has been fraudulently or feloniously put into circulation. There the party sued, upon proof of that fact, and having given the plaintiff notice of his intention previous to the trial, has a right to call upon the holder to prove how he came by it, and upon his failing to give such proof, the defendant is entitled to a verdict in his favor. In the case in which this was first established in Pennsylvania, the suit was by an indorsee against an indorser. The defendant, having given notice to the plaintiff that proof would be required of him of the consideration he gave for the note, and of the circumstances under which it came to his hands, offered to prove on the trial that the note was given by the maker to the defendant for goods sold and delivered, that it was never put in circulation by the payee, his name having been written upon it merely for the purpose of collection in bank, where it was deposited by him; that in consequence of an arrangement between the maker and him the note was taken out of bank by the latter, settled for and sent to the maker to be cancelled, and that having neglected to strike his name off the note, he sent immediately to have it done, and was told by the maker that the note had been destroyed. It was decided by the Supreme Court that this evidence was proper, and that the effect of it would be to throw upon the plaintiff the

necessity of proving that he was a *bona fide* holder for valuable consideration. "Honesty and good faith," said C. J. Tilghman, "are the basis of mercantile law. Those, therefore, who act with honesty and good faith, and those only, are worthy of protection. Negotiable paper stands in the place of specie; it is, therefore, of the utmost importance, that when such paper is fairly put into circulation, the *bona fide* holder should be involved in no difficulty on account of secret transactions between the original parties. * * * But, although the person, who acquires paper in the *usual course of business*, should receive all possible protection, yet there is no principle of justice or sound policy which requires the same extension of favor to one who comes to the possession of it in *an unfair manner*, and *without* consideration. In the first instance it is presumed that every man acts fairly. It lies on the defendant, therefore, to show some probable ground of suspicion, before the plaintiff is expected to do anything more than produce the note on which he founds his action. But this being done, it is reasonable that the holder should be called on to rebut the suspicion. All that is asked of him is to show that he has acted fairly and paid value." (5 Binn. 469.) This exception to the general rule appears not to be inconsistent with justice and sound policy. It is calculated to check secret transfers by fraud and collusion to a *mala fide* holder for the purpose of throwing on a party to a note or bill a responsi-

bility which would be unjust, and which, if the truth appeared, he could not be subjected to. Nor does it seem to impose any undue hardship on the holder to oblige him in such a case to show that consideration, which is the foundation of the privilege he enjoys beyond the person from whom he derives title. It will be observed that it is not enough to show merely a want of consideration between the original parties—as that it was an accommodation note—in order to give the defendant a right to call on the holder to prove his *bona fides*—it is necessary to prove that the bill or note was obtained or put into circulation by fraud or falsehood. The maker or indorser of an accommodation note or bill agrees, by its very negotiable character, that the person for whose use it is made shall put it in circulation. It is the very object for which it is made. He has no right, therefore, to complain of his own act; and a holder placing confidence in such an instrument ought not to be compelled to prove consideration. In many cases it would be exceedingly difficult to do so, and to require it would throw a serious impediment in the way of negotiable paper. It is otherwise when there is fraud, because then the maker gives no such authority. He is in the light of an unfortunate rather than an imprudent man, and protection will be given to him so far as to require of the holder proof of a valuable consideration. The policy of the law is to encourage the circulation of negotiable paper, and it only

interposes to require extraordinary proof from the holder in cases in which it is necessary in order to protect one who has been imposed upon in some way or other.

Except, therefore, in this particular case, the defendant sued by the holder of a bill or note, besides proving his defence as against the original party, either want of consideration, bad consideration or other defence, must go farther and prove affirmatively that the holder did not give value for it, or that he took it without notice or not in the usual course of business.

As to the value which is requisite to clothe a holder with these superior commercial privileges, a very important question has arisen, whether a precedent indebtedness by the indorser to the indorsee is such a valuable consideration as the law demands. In other words, whether the payee of a note or bill, as to whom there is a good defence, can pass it to a creditor for a precedent debt, so as to give to his creditor a better title than he himself has. On the one hand it may be said, that if the creditor fails to recover he is in no worse condition than he was before; and, on the other hand, that such a transfer is most frequently followed by indulgence to the debtor, even if there is not an express contract to that effect. It was held in New York, that where a note had been transferred as security or collateral for a precedent debt, it was not to be regarded as a transfer for value in the usual course of business. This case

has been followed by many subsequent ones in that State, but a distinction has been recognized between the case when the note is taken simply as collateral, and when it is received in absolute payment or extinguishment of the debt, or when it is pledged as security for liabilities then or thereafter to be incurred. In the latter case the transfer has been held to be founded on a valuable consideration. In other States the whole doctrine has been repudiated, and also in the Supreme Court of the United States, where it has been held that receiving a note, whether in payment of or as security for a pre-existing debt, is founded on a sufficient consideration, and is in the usual course of business, and entitles the taker to all the rights and privileges of a *bona fide* holder. "It is for the benefit and convenience of the commercial world," said Judge Story, "to give as wide an extent as practicable to the credit and circulation of negotiable paper, that it may pass, not only as security for new purchases and advances made upon the transfer thereof, but also in payment of and as security for pre-existing debts. The creditor is thereby enabled to realize or secure his debt, and thus may safely give a prolonged credit or forbear from taking any legal steps to enforce his right. The debtor also has the advantage of making his negotiable securities of equivalant value to cash. But establish the opposite conclusion, that negotiable paper cannot be applied in payment of or as security for pre-

existing debts, without letting in all the equities between the original and antecedent parties, and the value and circulation of such securities must be essentially diminished, and the debtor driven to the embarrassment of making a sale thereof, often at a ruinous discount, to some third person, and then by circuity to apply the proceeds to the payment of his debts." (16 Peters, 1.) The force of this line of argument has always seemed to me perfectly conclusive—and that it would do well for those States in which the New York doctrine has been received to retrace their steps. The decisions of the Supreme Court of the United States are doubtless of no binding authority, except in questions upon the construction of the Constitution and of Acts of Congress; yet *conventionally* they ought to be regarded with as high respect upon questions of mercantile law. The Courts in Pennsylvania have, in one or two cases, followed New York upon this question, although with evident reluctance, and the last case on the subject, though it does not profess to overrule, certainly to some extent shakes the authority of the earlier cases. In one of them Judge Rogers said, "It has been repeatedly held that a collateral security for a pre-existing debt without more is not such a consideration as will give title to the holder; yet if there is a new and distinct consideration the holder is a purchaser for value, and as such protected from a defence which would have been available between the original parties. It seems

to me there would be no great difficulty in proving that it would have been better not to have restrained the negotiability of paper *bona fide* pledged as a collateral security for a debt; but on this point the law is settled." (6 Whart. 220.) In the latter case, to which reference has been made, it was decided that if a note is made for the accommodation of the payee, and placed in his hands, he may pledge it for an antecedent debt as well as sell or discount it, and that the maker cannot set up the want of consideration in an action against him by the pledgee. "We think," says the Court, "that where a person gives another an accommodation note, it contains an authority to use it in the payment of an existing debt, to sell or discount it, or if more to his interest, to pledge it as collateral security for money advanced at the time, or before advanced, or on a running account between the parties for money advanced before, at the time, or afterwards. In short, that he has complete control to use it, as the name imports, for his own benefit or accommodation, in any manner he may judge best calculated to advance his own interest. If he can prevent a suit against him by pledging the note intentionally drawn in the usual commercial form, and intended to be used without restriction, and by this means preserve his credit and save himself from utter ruin, there is nothing that I see either in law or morals to prevent him. Of what consequence is it to the maker whether he sells the note, gives it

as a collateral security for a debt already contracted, or for money advanced at the time of the transaction? Accommodation paper is a loan of the credit of the maker to the extent of the value of the note for the benefit of the payee without restriction, and this is the light in which accommodation paper is received by the whole commercial world." (3 Barr, 381.)

Even, however, if the holder gave value, if he took the note with actual notice of a subsisting equity, he is then in privity with the original parties. Indeed, if an indorsee receives a note or bill, heedlessly, and under circumstances which ought to have excited the suspicions of a prudent and careful man, the maker or indorser may be let into his defence; but it has been held that an advertisement in a newspaper is not enough, unless the holder is proven to have seen it before he took the note. It would be of dangerous consequence to hold an advertisement in the gazette to be such an actual notice as to visit a party with all the consequences of full and express notice. A general warning or notice in the gazette, not to trust a wife, is not a sufficient prohibition to excuse the husband from liability for necessaries, though an actual notice would be. Notice in the newspaper of dissolution of partnership, is not sufficient as to persons who have previously dealt with the firm. Though it be proved that the party was a subscriber, yet the newspaper may not have been delivered; if left

at his abode, he may not have read it, or not till subsequently to the transaction it related to. It would be hard to subject a man to the consequences of *mala fides*, when he perhaps never had knowledge of the matter alleged. In the case of a common carrier, a notice limiting his responsibility, was held not sufficiently given, constantly published in a weekly newspaper, which the party had taken for three years. It would not be intended, says the Court, that a party read all the contents of any newspaper he might choose to take. (3 Watts, 20.)

Wherever the note is received not in the usual course of business, or there are circumstances to excite suspicion, and which ought to put a prudent man on inquiry, then the party will be let into his defence. Thus, in a case in which the note was passed by the maker and not by the payee to the holder, it was held that such was not the usual course, and that it was enough to affect the indorsee with the equities between the original parties. When the maker is acting, therefore, without authority from the payee—when he is perverting the purpose for which the note was made—the payee and indorser will be permitted to show it under such circumstances. The most ordinary case of this class, however, is that of overdue paper. A note or bill passed after it is due, is not passed in the usual course of business. It is settled, however, that as to overdue paper, the holder takes it discharged of any mere cross-

demand or set-off, and is only affected by equities growing out of the bill or note itself.

There are a few more principles of practical importance connected with this topic to be noticed. One of these is that the holder, though he may himself have had notice, may take shelter under the *bona fides* of any prior holder. If the note has once passed into the hands of such a one without notice, he can transfer his full right to any one, whether his transferree have or have not notice. It is evident that if this were not so, a *bona fide* holder might not be able to make any commercial use of the paper. The whole market might become apprised of the original fraud or defence, and thus he would be deprived of one important benefit of his property. Another point not to be forgotten is, that when a statute expressly avoids the note or bill on account of the illegality of the consideration, then it is also void in the hands even of a *bona fide* holder. Thus it has been held that a negotiable note given for a gaming consideration is void, even in the hands of an innocent holder, who received it in the usual course of business, without notice or knowledge of the illegal taint of its birth. Our Act of April 22, 1794, enacts that persons losing money at any game of hazard or game whatsoever, "shall not be compelled to pay or make good the same; and every contract, note, bill, bond, judgment, mortgage, or other security or conveyance, whatsoever, given, granted, drawn,

or entered into for the security or satisfaction of the same, or any part thereof, shall be utterly void and of none effect." When, however, the statute does not declare the contract, note, or security void —then the holder is not affected by the unlawfulness of the consideration between the original parties. Thus the payee of a negotiable note—given for a sum of money lent and more than lawful interest—indorses it, and it passes into the hands of a *bona fide* holder unconnected with the usurious contract, such holder cannot be affected by the unlawfulness which existed between the original parties. In England, a note given to secure a usurious loan was declared absolutely void by the statute of Anne, and was so considered, even in the hands of an innocent indorsee, but this has been altered in that country by the statute of 58 Geo. 3.

It would require a volume instead of a lecture to consider and discuss even simply all the important and curious questions which have arisen or may arise in regard to commercial paper. A mere skeleton of a subject, which professes to exhaust without discussing, would not be likely to impress the mind and memory. I have thought that it would be more instructive to select and illustrate a few of those points and doctrines, which are of most common occurrence, and with which it is particularly necessary that practical business men should be familiar. Following the course thus marked out to myself, I shall

devote the residue of this lecture to the consideration of the leading rules and principles which relate to the topics of demand, notice and protest of bills and notes.

The acceptor of a bill of exchange and the maker of a promissory note are primarily liable. It is not necessary as to these parties, in order to fix their liability, that there should be demand or notice. The drawer of a bill of exchange, and the indorser of either a bill or note, are only secondarily and contingently liable in case the acceptor or maker does not pay on demand at maturity, and due notice of the dishonor of the note or bill is given. It is necessary, according to the commercial law, that at the maturity of the paper, demand should be made on the party primarily liable, and immediate notice given to those secondarily liable, in order to fix them absolutely with the legal obligation to pay. The strict rules of the commercial law in regard to the time and manner of making the demand and giving the notice, have been adopted in this and most of the other United States.

Let us consider then, in the first place, where, when, and in what manner, the demand must be made. When no place of payment is mentioned in the note or bill, payment must be demanded of the maker or acceptor at his place of residence or business, or, if that be not known, due diligence must be used to find it. A demand sent to him through the post-office is not such a demand as

the law requires when the maker's residence is supposed to be ascertained. When it is at a distance from the holder's residence, the note itself must be sent to some person with authority to make the demand. If the maker or acceptor has merely removed from his usual place of residence to another, in the same State or country, it is incumbent on the holder to make every reasonable endeavor to find out whither he has removed, and in case he succeed in such attempt, either in person or by a duly authorized agent, to present the bill or note for payment at that place. But if the maker or acceptor has absconded, that circumstance will dispense with the necessity of making any further inquiry after him. When he has secretly fled, an application at the place would lead to no information in respect to him, and the law requires nothing which is nugatory. The same rule which exists in the case of absconding applies to that of his removal into another State or country after the execution of the instrument. In a case in the Supreme Court of the United States, it appeared that the maker of the note had removed from the District of Columbia to the State of Maryland, to a place within about nine miles of the District. There was nothing to sanction its being construed into an act of absconding, and the Court say, that in England, from the absconding of the maker or his removal out of the kingdom, the indorser is held to stand committed; and hence a removal from the sea-

board to the frontier, or *vice versa*, would be attended with all the hardships to a holder, especially one of the same State with the maker, that could result from crossing the British Channel. The States of this Union are in all other respects than is specially provided in the Federal Constitution, foreign States as to each other. The holder, therefore, is not bound to search for the maker in a foreign country when he has removed thither after the date of the note, but his removal dispenses with any further effort, and makes the indorser *ipso facto* liable without it. (9 Wheat. 661.)

If the note should be made payable at a particular place, it is not indispensable that the demand should be made there, though the opinion has been entertained and expressed that in the case of a note made payable at a bank, that if the maker or acceptor pays the money into the bank to the credit of the payee, in such note or bill, and leaves it there, it will be a complete discharge as to all the parties, even though the money should be lost by robbery of the bank or otherwise after the maturity. When a promissory note is payable at a particular place, such as a bank, and on a particular day, and the indorsee or holder is at the bank until it closes at the usual hour, on the day on which the note falls due, ready to receive payment, no further demand on the maker is necessary in order to charge the indorsers. When a note is made payable at a bank it need not be

shown that the cashier was at the bank all the business hours on the day of payment in order to receive it—the presumption is that he performed his duty. But the circumstance of a note being dated at a particular place is not equivalent to making it payable there so as to render it unnecessary to go out of the place to demand payment of the maker.

Then as to the time when demand ought to be made. By the commercial law three days of grace are allowed to the maker or acceptor to pay the note or bill after it has become payable on its face. To charge the drawer or indorser, the demand must be made on the last day of grace, or, if that falls upon a Sunday, on the day before. By an Act of Assembly of Pennsylvania, of 11th April, 1848, payment of all notes, checks, bills of exchange, or other instruments negotiable by the laws of this Commonwealth, and becoming payable on Christmas day, or the first day of January, the fourth day of July, or any other day fixed upon by law or by the proclamation of the Governor of this Commonwealth as a day of general thanksgiving, or for the general cessation of business in any year, shall be deemed to become due on the secular day next preceding—with a proviso, however, that it is not to affect any demand made as heretofore at the option of the holder. A demand made on a Sunday would be absolutely good for nothing. It is a day upon which all worldly business is absolutely prohibited

by statute. When a note falls due on Sunday, demand must be made on the Saturday preceding; but as to the other days enumerated it is at the option of the holder. He may demand, when the note falls due on these days, on the last day of grace or on the day before. In all other cases a demand on the maker or acceptor, made before the last day of grace, equally with one made afterwards, is of no avail to charge the indorser. There is no difference in this respect between foreign and inland bills and notes. Said Chief Justice Gibson, in a case in which this question was mooted, "Though there was once a doubt in respect to the point before us, it is now settled. It was supposed by intelligent lawyers that there is a difference in this particular between foreign and inland bills; and that the latter, not having been originally within the law merchant, do not authorize presentment and notice on the last day of grace, the acceptor, it was thought, having the whole of it to make payment on the principle of the common law. But days of grace themselves are creatures of the mercantile law; and if the payment of inland bills were not regulated by it, days of grace could not be predicated of them." (9 Barr, 178.) In the case, in which these remarks were made, the notary having presented the note for payment on the last day of grace, being Saturday, and demanded payment at the dwelling of the maker, was told that he was not at home, but that he would be at home on Monday and pay

the note—it was held that it was in law a flat refusal to pay, and authorized notice to be given on the same day to the indorsers.

It is to be observed that checks upon banks or bankers, have no days of grace. These are payable on demand at any time after date, or if payable at a future day, on the very day named. Although in form a bill of exchange, a check differs from it in other particulars. It requires no acceptance. The drawer of a check is not a surety, but the principal debtor, as much as the maker of a promissory note. It is an absolute appropriation of so much money in the hands of the banker to the holder of the check, and there it ought to remain until called for, and the drawer has no reason to complain of delay, unless upon the intermediate failure of his banker. By unreasonable delay in such a case, the holder takes the risk of the failure of the person or bank on which the check is drawn. This is quite distinct from the strict rule of diligence applicable to a surety, in which light stands the indorser of a note or a drawer of a bill. A check post-dated has been decided to be payable on the day of its date, without any days of grace.

The indorser may undoubtedly waive demand on the maker by express agreement; and it has been held by the Supreme Court that the waiver of protest by an indorser on the day of maturity of the note, puts him in the same situation as if the protest had been made and proved, and there

being no contradictory evidence, it is proof of demand and refusal and notice.

We come now to consider the subject of notice to drawers and indorsers. It ought to be observed that as to bills of exchange, payable at a fixed time after date, they need not be presented until maturity. But when payable so many days after sight, they must be presented for acceptance—and in all cases where acceptance is refused, the same steps are necessary, in order to fix the prior parties, as in case of demand of payment and refusal. The notice should be given by the holder, on the same or the next day, to the indorser immediately liable to him—by him to his indorser—and one day is then allowed for each party to the note, and if Sunday intervenes, that is not to be counted. The notice when given by the holder directly is soon enough, if it reach the particular indorser as soon as it would have reached him circuitously through the subsequent indorsers, each of whom are entitled to an entire day, if he choose to insist on it to hand it on. It is enough that the drawer or indorser receive notice in as many days as there are subsequent indorsers, unless it is shown that each indorser gave notice within a day after receiving it, as if any one has been beyond the day, the drawer and prior indorsers are discharged: in other words, that there shall not be a longer link in the chain than the space of a single day, and that the holder shall not affect the indorser with notice after he has been discharged from liability

to the subsequent indorsers. The notice to be given by one to another, who resides in the same town or city, must be served personally, or by leaving it as his residence or place of business; depositing it in the post-office directed to him is not sufficient. But when they reside in different places, a notice of protest sent by mail and directed to the indorser, at his nearest post-office, is sufficient, and if properly directed it is good, although the letter containing it should miscarry. What is due diligence, is always a question of law for the Court and not the jury to decide. It has been held that the holder of a note or bill cannot avail himself of the ignorance of his agent, even though he should employ for the purpose a notary public, as to the residence of the indorser, and consequent neglect in not giving notice of protest. If he knows, he must disclose it to the notary: his neglect to do so will discharge the indorsers. When a notary is employed, it is the duty of the holder, if he knows, to inform him of the indorser's place of residence, and if this be omitted, the notary ought, in the first instance, to apply to all the parties to the bill for information, and especially to the holder, if the notary wishes to relieve himself from liability. If the residence of the party, to whom the notice ought to be given, be not known to the holder, he must nevertheless not remain in a state of passive and contented ignorance, but must use due diligence to discover his residence.

If the drawee of a bill refuse to accept, because he has no effects of the drawer in hand, and the drawer had no right to draw, and no right to expect that his bill would be honored, protest and notice to the drawer are not necessary. The exception is confined to the drawer, and does not apply to the indorser of a bill drawn without funds. He is entitled to notice. If a bank be closed by process of law before a check can be presented with due diligence, no demand or presentment is necessary; and so if the maker of the check has no funds in the bank.

Giving time by the holder to the acceptor of a bill or maker of a note, will discharge the other parties; but the agreement for delay must be one having a sufficient consideration, and binding in law upon the parties; mere indulgence will work no prejudice. There is no difference in this respect between accommodation and other paper, though as between themselves the position of the parties to each other may be different. The holder of such paper must demand of the maker, and give notice to the indorser; and though he may know that it was made for the accommodation of the indorser, his giving time to such indorser will not discharge the maker. The holder may give time to an immediate indorser, and still hold the parties behind him. A prior party to a bill is not discharged by a release of a subsequent party. But the holder cannot reverse this order, and compound with prior parties without the consent of

subsequent ones, for it varies the rights of the subsequent parties and discharges them. The release or discharge of a prior indorser discharges all subsequent indorsers. The parties to a bill are chargeable in different order. The acceptor is first liable, and then the drawer and indorser in the order in which they stand on the bill. Taking new security, giving time, or releasing a subsequent indorser, cannot prejudice a prior indorser, because he has no rights against such subsequent indorser.

Demand and notice may be made in general by the holder in person or by agent, and the notice may be verbal as well as in writing; and of course care must be taken to have competent and disinterested evidence of these facts. An actual protest by a notary is only necessary in the case of a foreign bill of exchange, which, however, a bill drawn in one State upon a person in another, is settled to be. A statute of this State having provided that the protests and certificates of notaries public, in regard to making demand and giving notice, shall be *prima facie* evidence of the facts set forth in them, it is by all means advisable in every case in which a note is not paid before 3 o'clock P.M. of the last day of grace, to place it in the hands of a notary for protest.

LECTURE IV.

ON BAILMENTS AND AGENCIES.

Definition of Bailment—Gratuitous—Simple Deposit—Mandate—Evidence in case of Loss—Loans—Pawns—Collaterals—Hiring for Use—Bailment to do Work for the Thing Bailed—Bailment to Carry—Common Carriers—Limitation of Carrier's Responsibility by special Agreement or Notice—Notice of Contents of Package—Delivery by Carrier—Agency defined—General or Special—Factors—Ratification, Express or Implied—Factor's Authority to Sell or Pledge—Liability of Agent or Factor to Third Persons—To their Principals—Lien of Agents or Factors—General or Particular—Revocation of Agency.

THE Contract of Bailment is one of the most important, and of the most common occurrence in the daily transactions of business life. Bailment is delivery of goods in trust upon a contract expressed or implied, that the trust shall be duly executed, and the goods restored by the bailee as soon as the purpose of the bailment shall be answered. The contract of agency is not strictly within the letter of this definition, as it is not necessarily accompanied with any delivery of goods by the principal to the agent, yet as it

most commonly is so accompanied, and in other respects has an affinity to the subject, I shall consider it in immediate connection with this topic.

Bailments may be divided into gratuitous and those founded on a consideration. Of gratuitous bailments there are three kinds. 1. *Depositum:* A simple deposit of goods by one man to the care of another, to be kept by him, and returned without any recompense or reward for so doing. As the depositary derives no benefit from the bailment, he is to keep the goods with reasonable care, and he is responsible only for gross neglect or for a violation of good faith. Gross neglect is the want of that care, which every man of common sense under the circumstances, takes of his own property. Such a bailee, who receives goods to keep *gratis*, is under the least responsibility of any species of trustee. If he keeps the goods as he keeps his own, though he keeps his own negligently, he is not answerable for them: for the keeping of them as he keeps his own, is an argument of his honesty. The depositary has only the naked custody or possession, and he cannot use, and much less dispose of the subject without the express or presumed permission of the depositor. If he sells the goods deposited for a particular purpose, in breach of his trust, the *bona fide* purchaser without notice is not protected against the real owner. 2. *Mandatum:* A mandate is when one undertakes, without

recompense, to do some act for another in respect to the thing bailed. The mandatory is like the depositary, responsible only for gross neglect or a breach of good faith. If, however, a man gratuitously assumes to transact a business, which requires skill and attention, a competent degree of such skill and attention will be required of him. He is not bound by his gratuitous promise to do the act; but if he enters upon the execution and does it amiss, through the want of due care, by which damage ensues to the other party, he will be responsible. Thus, where one undertook, *gratis*, to carry several hogsheads of brandy from one place to another, and did it so negligently and improvidently that one of the hogsheads was staved and the brandy lost, he was held liable to an action for the damage. Much will depend upon the profession and situation of a mandatory. If a ship-broker or a clerk in the custom-house undertakes gratuitously to enter goods, and does it carelessly, so that damage ensues, he is liable. A person whose employment and situation did not imply competent knowledge and skill, would not be. A physician undertaking a case gratuitously, or a lawyer a suit in court, is liable for malpractice—not so a person whose profession gave no such assurance of knowledge or skill. Neither a depositary nor mandatory are liable when the goods are lost from accident or robbery. An important case in our own Supreme Court will illustrate both these kinds of gratuitous bail-

ments, and show how far the courts are disposed to go in moulding the rules of evidence so as to protect the gratuitous bailee. It was a case in which the plaintiff had delivered to the defendant five bank notes of fifty dollars each, enclosed in a letter to a third person, which he undertook to deliver without fee or reward, but of which he alleged that he had been robbed, his valise cut open in his room in the hotel at which he lodged, and the letter abstracted with the other contents of the valise. The main difficulty with the defendant was for him to prove the loss, being himself clearly not a competent witness to discharge himself from liability. The court began by laying down as undisputed the rule of law that on an undertaking to perform a gratuitous act, from which the bailee was to receive no benefit, and the benefit was wholly to accrue to the bailor, "the bailee is only liable for *gross negligence*, *dolo proximus*, a practice equal to a fraud. It is that omission of care which even the most inattentive and thoughtless men never fail to take of their own concerns." "Evidence," say they, "is constantly accommodating itself to the state of society and the concerns of the world, and therefore must accommodate itself to the altered mode of travelling by stage-coaches and steamboats, instead of on horseback or in private carriages. Travellers are constantly more exposed to secret stealth in a crowded stage, or in a steamboat full of passengers, where the traveller cannot keep his eye

on his own baggage. Inns in our large cities are generally filled with strangers, and with the utmost circumspection, he is certainly more exposed to these risks." It was held that he might give in evidence his own acts and declarations immediately before and after the loss, to show the fact and how it occurred. "The next best evidence to the proof of a thing itself is proof of those circumstances which naturally would attend it. These were the production of the cut valise, the immediate promulgation of the theft and pursuit of the property. It has been said, this is the party making evidence for himself. It is not, but evidence of circumstances immediately preceding and following the theft. The direct proof would be difficult, and is not to be looked for. The circumstances that would naturally attend the whole transaction of a man placed in the situation in which the defendant stood in such case from necessity is proper evidence." (14 Serg. & Rawle, 275.)

3. Another species of gratuitous bailment is *commodatum*—the loan of an article for a certain time, to be used by the borrower without paying for the use. Here the situation of parties is reversed from the case of the deposit or mandate, and the rule applicable is also reversed. The bailee derives all the benefit, and the bailor none. According to Pothier, the celebrated French jurist, the borrower is bound to bestow on the preservation of the thing borrowed, not merely

ordinary but the greatest care, and he is responsible not merely for slight but for the slightest neglect. The thing borrowed is to be returned in as good a plight as it was when it was first delivered, subject, however, to the deterioration arising from the ordinary and reasonable use of the loan. If the article perish, or be lost, or injured by theft, accident, or casualties, which could not be foreseen and guarded against, or by the wear and tear of the article in the reasonable use of it, without any blame or neglect imputable to the borrower, the owner must bear the loss. The borrower is, however, responsible, even for loss by inevitable accident, if he has detained the article borrowed beyond the time he ought to have returned it, for the loss is then to be presumed to have arisen from his breach of duty: a rule of law which it would be well for the class of borrowers to bear in mind. I have been speaking of a loan for use, where the identical thing is to be returned. In a loan for consumption, when not the identical thing, but only an equal quantity of the same kind is to be returned, the rule is different. Then the borrower can make no excuse, and must bear the loss, even if the thing borrowed is lost or destroyed by inevitable accident.

We now come to those kinds of bailment which are not gratuitous. These are—1. *Pawns* or *Pledges*. This is a bailment for the benefit of the bailee, the thing being delivered into his possession as security for a debt cotemporaneously or

precedently contracted. It is a case in which ordinary care is demanded of a bailee, and he is responsible for the consequences of ordinary neglect. Ordinary neglect is the want of that diligence which the generality of mankind use in their own concerns; and that diligence is necessarily required when the contract is reciprocally beneficial. The pawnee has a special property in the pawn: he may maintain an action against a stranger for taking it or doing it an injury. He may assign it, and his assignee may assert the pawnee's title to it against the pawnor or a stranger. The pawnor can recover possession from the pawnee or his assignee only upon payment or tender of the debt. The pawnee may even use the thing pawned, provided it be not the worse for it, if the keeping of it be a charge to him, in recompense of which he may, for instance, milk a cow or ride a horse. But though it be not the worse for it, he can not use it but at his peril; for a pawn is in the nature of a deposit, and in the case indicated, the loss of it is attributable to the using of it, which put it in the way of danger. He is consequently answerable for damage occasioned by his use of it. It would seem that the pawnee has no right to speculate with the thing pledged—to sell it for example, though he should offer to restore an article of the same kind and quality. The pawnor would have a right either to affirm the sale and call upon the pawnee to account for and pay over to him the proceeds of it,

or disaffirm it, and follow the goods into the hands of the purchaser, or hold the pawnee himself personally liable for its value at the time of redemption. There are, however, some recognized exceptions to this rule. If money or bank notes be deposited as security, the identical coin or notes need not be returned, though in that case if the bank notes had depreciated, it is questionable whether the pawnee could answer the demand of the pawnor by a tender of other notes of the same bank. It has been held by the Supreme Court, that the pledgee of bank-stock has a right to mix the stock with other stock of the same kind held by him, and that it is enough for him to show that he always had during the existence of the pledge, that quantity of the particular stock on hand ready to be delivered upon redemption. "It is in general true," say the Court, "that when the pledge is distinctive in its character, and therefore capable of being recognized among other things of like nature, or when a mark is set upon it with a view to its discrimination, the pledgee is bound to re-deliver the identical article pledged, and cannot substitute something of the like kind, unless so authorized by the contract. But there is a manifest difference, *ex necessitate*, when the thing pledged from its very nature is incapable in itself of identification, if once mingled with other things of the same kind." In such cases it is the duty of the pledgor to put a mark upon it, by which it may be distin-

guished, for if a person will suffer his property to go into a common mass without making some provision for its identification, he has no right to ask more than that the quantity he put in should always be there and ready for him. (5 Barr, 41.) A large and important class of cases falling under this head is the pledge of notes and other money securities for debts. They are commonly denominated *collaterals*—although that term may be and often is applied also to the pledge of goods and merchandise, and very frequently also to other evidences of debt between the same parties. They fall, in general, under the same rule and principles as apply to other pawns and pledges. The person with whom the collaterals are deposited is bound to ordinary care in preserving them. If negotiable securities are deposited, he is bound to use due diligence in taking those measures which are necessary to fix the parties—as making demand and giving notice—but unless he has specially contracted to do so, he is not bound to proceed to collect them. When it is another security of the debtor, as a general rule, unless actually accepted as payment, it does not extinguish the original debt, but is merely collateral. Still if the creditor has parted with it, he will not be allowed to recover upon the original debt, without first producing the collateral or satisfactorily accounting for its non-production.

2. The contract of hiring a thing for use. The hirer is bound to ordinary care and diligence, and

is answerable only for ordinary neglect; for this species of hiring is one of mutual benefit. He is bound to use the article with due care and moderation, and not apply it to any other use or detain it for a longer period than that for which it was hired. The bailee, when called upon for the article deposited, must deliver it or account for his default by showing a loss of it by some violence, theft, or accident. When the loss is shown, the proof of negligence or want of due care is thrown upon the bailor, and the bailee is not bound to prove affirmatively that he used reasonable care. If, however, a bailee for hire returns the property in a damaged state, and gives no explanation how the injury happened, the burden of proof to show that there was no negligence is upon him. The bailor commits his property to the bailee for reward, in the case of hiring, it is true; but upon the implied understanding that he will observe due care in its use. The property is in the possession and under the oversight of the bailee whilst the bailor is at a distance. Under these circumstances, good faith requires that, if the property is returned in a damaged condition, some account should be given of the time, place, and manner of the occurrence of the injury, so that the bailor may be enabled to test the accuracy of the bailee's report by suitable inquiries in the neighborhood and locality of the injury. The bearing of the law is always against him who remains silent when justice and honesty require him to speak.

3. Bailment to do work on the thing bailed: that is, when work and labor, or care and pains, are to be bestowed on the thing delivered, for a pecuniary recompense. The workman for hire must answer for ordinary neglect of the goods bailed, and apply a degree of skill equal to his undertaking. Every man is presumed to possess the ordinary skill requisite to the due exercise of the art or trade which he assumes. Thus, if a forwarding merchant erroneously insert the name of a consignee in the bill of lading, which was not marked on the goods, and, in consequence of that, the goods are seized and sold by the sheriff as the property of the person whose name is thus inserted, the forwarding merchant is liable to the real owner. And when the consignor marks the goods with the initials only of the consignee, he is guilty of no negligence which will protect the forwarding merchant from a loss by his entering them on the bill of lading in the name of a stranger whereby the goods are lost. Warehousemen and forwarding merchants are responsible only for want of good faith and ordinary diligence; but one of the first duties of a consignee for transportation is to obey the instructions of the consignor, either express or fairly implied. When they undertake to vary from the instructions, proceeding from whatever motive it may, and a loss is occasioned thereby, they are clearly liable to the owner of the goods.

4. Bailment, to carry the thing bailed, for hire.

This is the most important, extensive, and useful of all the various contracts that belong to the head of bailment. A particular carrier for hire, like other bailees for hire, is only answerable for ordinary neglect; but if he carries on the business of carrying, and holds himself out to carry all goods, or all goods of a particular class, he then falls within the class of *common carriers*. They are in the nature of insurers, and are answerable for all losses which do not fall within the excepted cases of inevitable accident and the public enemies of the country. It is important, then, in the first place, to consider who are common carriers, and then the extent of their responsibility, and how far they may limit it by special contract or notice.

Common carriers undertake generally, and not as a casual occupation, and for all people indifferently, to convey goods and deliver them at a place appointed, for hire, as a business, and with or without a special agreement as to price. They consist of two distinct classes of men, viz.: inland carriers by land or water, and carriers by sea. As they hold themselves out to the world as common carriers for a reasonable compensation, they assume to do, and are bound to do, what is required of them in the course of their employment, if they have the requisite convenience to carry and are offered a reasonable or customary price; and if they refuse, without some just ground, they are liable to an action. This is undoubtedly a true

statement of the law on this subject in England, and in most of our sister States, but it requires to be stated in a somewhat modified form as applied to this State. It can best be illustrated by a case which came before the Supreme Court, and the principles upon which it was decided. The defendant being a farmer, applied at the store of the plaintiff for the hauling of goods from Lewistown to Bellefonte, where he was going with a load of his own produce. He received an order and loaded the goods. On the way, the head came out of a hogshead of molasses, without any negligence on his part, and it was wholly lost. He was held liable as a common carrier. It was considered that rules, which received their form from the business of a people whose occupations are definite, regular, and fixed, must be applied with much caution and no little qualification to the business of a people whose occupations are vague, desultory, and irregular. In England, one who holds himself out as a general carrier is bound to take employment at the current price; but it will not be thought that he is bound to do so here. Nothing was more common formerly than for the wagoners to lie by in Philadelphia for a rise of wages. In England the obligation to carry at request upon the carrier's particular route, is the criterion of the profession, but it is certainly not so with us. In Pennsylvania we had no carriers exclusively between particular places, before the establishment of our public lines of

transportation; and, according to the English principle, we could have no common carriers, for it was not pretended that a wagoner could be compelled to load for any part of the continent. But the policy of holding him answerable as an insurer was more obviously dictated by the solitary and mountainous regions through which his course for the most part lay, than it is by the frequented thoroughfares of England. But the Pennsylvania wagoner was not always such, even by profession. No inconsiderable part of the transportation was done by the farmers of the interior, who took their produce to Philadelphia, and procured return loads for the retail merchants of the neighboring towns, and many of them passed by their homes with loads to Pittsburg or Wheeling, the principal points of embarkation on the Ohio. But no one supposed they were not responsible as common carriers; and they always compensated losses as such. They presented themselves as applicants for employment to those who could give it, and were not distinguishable in their appearance or in the equipment of their teams from carriers by profession. What has a merchant to do with the private business of those who publicly solicit employment from him? They offer themselves to him as competent to perform the service required, and in the absence of express reservation they contract to perform it on the usual terms and under the usual responsibility. A private person may undoubtedly contract with another

for the carriage of his goods and incur no responsibility beyond that of any ordinary bailee for hire, that is to say the responsibility of ordinary diligence. But if he seek employment generally, though it be only as incidental to his principal occupation, it is otherwise. Thus stage proprietors are carriers for hire of passengers and their baggage, but not insurers either of the lives and limbs of the one or the safe transportation of the other. They are held, indeed, and properly, to a very high degree of skill and care. But if stage proprietors make a practice of receiving parcels and packages for carriage, and of carrying them for hire, that will make them common carriers. (1 Watts & Serg. 285.)

The rule of the English law as to the extent of the common carrier's responsibility, has been sometimes regarded as a harsh and cruel one. He is liable for every accident not arising from inevitable accident or a public enemy. It seems, however, absolutely necessary, in order to guard against frauds and collusions, easily practised and hard to prove. What may be called inevitable accident, or, as it is generally termed, the act of God, has sometimes occasioned difference of sentiment. But the best opinion is that the act of God is something in which the act of man has no part, such as lightning, tempest, wind, &c. In our rivers, which are interspersed with falls and rapids, a sudden flaw, not amounting to storm or tempest, might have such an effect as to

defeat all human skill and diligence, and should be considered as inevitable accident. There is great reason why the carrier should be liable for all kinds of embezzlement, stealing and robbery, except by the public enemy: for in these cases collusion may be so artfully concealed that it would be almost impossible to detect it.

It is clearly settled, however, that the carrier may limit his common law responsibility by special agreement with his customer. The policy of ever having permitted this has been frequently and much doubted, and the Courts have always placed a strict construction as against the carrier upon these special agreements. The carrier has the exclusive custody of the goods, and to convict him of negligence in his function, would be as impracticable as to convict him of connivance at robbery, against which the common law rule of his responsibility was intended more especially to guard. From his servants, who are usually the only persons that can speak of the matter, it would be idle to expect testimony to implicate themselves; and the owner can seldom have any other account of his property than what they may choose to give him. An ordinary bailee for hire cannot exempt himself by notice or agreement from responsibility for actual negligence—as in the case of a stage-coach proprietor, who stipulates that all baggage shall be at the risk of the owner—much less can a common carrier.

The common carrier is liable for the value of

the contents of a box or package, though he was not informed of it, and to relieve himself from responsibility he must bring home notice of any stipulation or condition to the contrary, to the knowledge of his employer. There is an exception to this doctrine, indeed, where any fraud or deception has been practised upon the carrier. Labelling a box or trunk intrusted to a carrier as containing articles of a different nature and value from its real contents, will dispense with further inquiry. Such an imposition destroys all just claim to indemnity; for it goes to deprive the carrier of the compensation he is entitled to in proportion to the value of the article intrusted to his care, and the consequent risk he incurs; and it tends to lessen the vigilance the carrier would otherwise bestow. Thus, when a box of jewelry was labelled "glass—this side up, with care," it was held that it prevented a recovery from the owner of the ship, even if the jewelry was purloined by the captain or any of the crew. The carrier, therefore, can always guard himself by a special acceptance, or by insisting to be made acquainted with the general nature of the articles, and of their value, before he contracts to receive them. It seems still to be questionable to what extent the carriers for passengers are liable for their baggage. There appears some reason for supposing that they cannot be held liable for anything beyond the ordinary wearing apparel of the passengers. Money or merchan-

dise so carried would seem to be excluded. But in the case of actual negligence on the part of the carrier, where the loss arises through his fault, and where there is entire *bona fides* on the part of the bailor, the law is otherwise.

When a German emigrant took passage in the line from New York to Philadelphia—and put on board the steamboat a trunk containing two thousand one hundred and two five-franc pieces, with wearing apparel, and paid for the extra weight, but did not inform the carriers of the contents, it was held that the carrier was responsible for its loss through the negligence or fraud of his agents; and it is very important to remark, it was settled in the same case that when a trunk or other package is lost in the carriage, and no proof given as to when or how it was lost, the legal inference is that it was lost or mislaid in consequence of the fraud or negligence of the carrier or his agents. It is not unreasonable to require the carrier to prove the loss, and the manner of it, and further, that the usual care and diligence has been used to avoid it. This is peculiarly within his knowledge, and in the knowledge of those who are in his employment and under his control (4 Rawle 67.) The man who undertakes to transport goods by water for hire, is bound to provide a vessel sufficient in all respects for the voyage, well manned and furnished with sails, anchors, and all necessary furniture. The like principle applies to road carriage. The cars or

wagons must be stanch and strong and well protected from fire. It has been held, however, that in an action against a common carrier for a loss, it is not sufficient to entitle the plaintiff to recover that there was a defect about the vessel, or want of skill in the carrier, but it must also appear that such defect or want of skill contributed, or may have contributed in some measure, to occasion the loss. It is the consequences of negligence, not the abstract existence of it, for which a carrier is liable.

Every bailee, who has by his labor and skill conferred value on specific chattels bailed to him, has a lien on them for his compensation. The common carrier has a lien, and may retain the goods until he has been paid his freight. But exclusive possession is necessary to authorize such lien, and therefore a journeyman or day laborer, who is a mere servant and not a bailee, has no such lien.

Actual delivery to the proper person is the duty of the carrier. The consignee may, however, take charge of the goods before they have arrived at their extreme or ultimate place of delivery; and the carrier's risk will then terminate. When the bailee is sued by the bailor for the goods, he cannot set up as a defence a better title in a stranger, unless he has actually parted with the possession to the person holding such better title. It may be correct enough to hold, when the real owner of the property does not appear and assert

his right to it, that the carrier or bailee shall not be permitted of his own mere motion to set up as a defence, against his bailor, such right for him. But it would be repugnant to every principle of honesty to say, that after the right owner has demanded the goods of the bailee, the latter shall not be permitted in an action brought against him by the bailor for the goods, to defend against his claim by showing clearly and conclusively, that the plaintiff acquired the possession of the goods either fraudulently, tortiously, or feloniously, without having obtained any right thereto.

The contract of Agency, in general, is so closely connected with that of Bailment, that they may with propriety be joined in a course of this character. Every bailee to do any work or service with the goods bailed to him, is an agent, though every agent is not a bailee, as he is not necessarily intrusted with the care and custody of specific goods. Agency, then, in its most general sense, is founded upon a contract, either express or implied, by which one of the parties confides to the other the management of some business to be transacted in his name or on his account, and by which the other assumes to do the business and to render an account of it.

The authority of an agent is either general or special. *Factor* is the mercantile term of a general agent, but of one who is in the habit of acting for several persons in that capacity. Though the term agent, being the most general denomina-

tion, includes a factor, yet the latter is only a particular species of agent. His time is not wholly taken up in the employment of any one person, but he may be and frequently is engaged every day in buying and selling goods for divers persons, who have employed him for that purpose. His employment in general is by persons who reside abroad or at some distance, and he is never employed to give all his time and attention exclusively to the business of the same individual for a definite period of time.

When the power is general, the agent may do anything to bind his principal within the scope of the business intrusted to him. But if his power be special, whatever he does, which is not in strict conformity to his authority, is not binding upon his principal. He may render himself personally responsible to those with whom he deals, but he cannot affect or transfer the rights or property of the constituent. Every man who transacts business with an agent is bound to inquire and inform himself as to the nature and extent of his authority. He cannot plead ignorance or even misinformation by the agent himself.

It is, however, a well settled, clear, and salutary rule in relation to agencies, whether general or special, that where the principal, with the knowledge of all the facts, adopts or acquiesces in the acts done under an assumed agency, he cannot be heard afterwards to impeach them under the pretence that they were done without authority or even

contrary to instructions. When the principal is informed of what has been done, he must dissent and give notice of it in a reasonable time, and if he does not, his assent and ratification will be presumed. The confirmation of acts of a particular character is evidence in many cases of a previous authority. Thus it has been held, that although it is not within the ordinary scope of the authority of the clerk in a store to borrow money and draw bills or notes, in the name of his employer, yet the confirmation of other transactions of the same kind will be evidence from which a prior authority may be inferred.

Mercantile custom settles in many cases the extent of the powers of factors or general agents. The act of a factor or general agent, even though contrary to instructions, will be binding, but then he will thereby become responsible to his principal. The most ordinary case is that of goods consigned for sale, with a limitation as to price. If no instructions are given, or they are not clear and explicit, the factor is allowed to use his best discretion, according to the usages of trade. He may sell on credit, unless specially restricted. It is the general rule of the English Mercantile Law, that a factor to sell has no power to pledge the goods of his principal. The only exception to this is in the case of negotiable paper, which he may pledge as well as sell. How far this has been modified by legislation in Pennsylvania will be stated presently. Before the legislature inter-

fered, however, it had been decided that if a merchandise broker, to whom goods are delivered by his principal, with power to sell, deliver and receive payments, deposit them in the usual course of business with a commission merchant, who advances his notes thereon, the deposit and advance are binding upon the principal. The policy of the old rule was vindicated on the ground that it advanced the commercial credit of the country, to afford strong protection to the property of foreigners sent here upon consignment. On the European Continent, it would seem, a different rule, in some respects, prevails. There possession constitutes title to movable property, so far as to secure *bona fide* purchasers, and persons making advances of money or credit on the pledge of property by the lawful possessor. It is understood that the rule on the Continent is, that a purchaser or pawnee, without notice, will hold the property against the principal, and in that it differs from the rule of the Common Law, where want of actual notice is immaterial.

The Act of Assembly of Pennsylvania, passed April 14, 1834, entitled "An act for the amendment of the law relating to factors," provides that "whenever any consignee or factor, having possession of merchandise, with authority to sell the same, or having possession of any bill of lading, permit, certificate, receipt, or order for the delivery of merchandise with the like authority (that is to sell or consign), shall deposit or pledge

such merchandise, or any part thereof, with any other person, as a security for any money advanced or negotiable instrument given by him on the faith thereof, such other person shall acquire, by virtue of such contract, the same interest in and authority over the said merchandise as he would have acquired thereby if such consignee or factor had been the actual owner thereof: Provided, that such person shall not have notice by such document or otherwise, before the time of such advance or receipt, that the holder of such merchandise or document is not the actual owner of such merchandise." There are other important provisions upon the same subject in this act, which may be thus summarily stated: 1. That a factor with authority to sell or consign, may pledge for advances made at the time by an innocent third person without actual notice. 2. That he cannot pledge for his own antecedent private debt, but in that case, as well as in the case of an advance made with notice, the pledgee succeeds to all the rights of the factor, and can hold against the principal, until the lien which the factor may have on the goods is satisfied and paid. 3. That in all cases the owner or principal may recover the goods out of the hands of the pledgee upon tender of the amount advanced by him, or the sum for which the goods have been pledged. 4. That a fraudulent pledge by a factor shall be a criminal offence or misdemeanor, punishable by a fine not exceeding $2000, and by imprisonment for a term not exceeding five years.

It may be said generally that this act makes the law in this State the same as that which exists on Continental Europe, as distinguished from the common law. It has justice and common sense on its side. I cannot avoid remarking that the best law would be that which would protect the *bona fide* purchaser or pledgee of personal property from a person in actual possession, in all cases whatever, without regard to the title of the possessor. The act in question is one step towards this result. There are no title deeds or records as to personal property, and how is a person to protect himself in making even the necessary purchases of life, much less in the contracts of business? If some one has lost an article, or been robbed, or defrauded, why should the loss fall upon an innocent man, who has bought in the street or the market, rather than the first loser? One of two innocent persons must suffer. Why not let the loss remain where it has fallen, rather than shift it from one to the other; especially as the person who has lost, been robbed or defrauded, has generally, in some respects, to blame himself? It is as often his fault as his misfortune. It is said, let the buyer beware. But what inquiry which the buyer can make will render him safe. There is no public office of record to which he can go to be informed of the title of personal property. If he inquires of the seller and demands reference from him as to his character and responsibility, which is all he can do, this will not

protect him from the consequences of mistake or misinformation, though all possible diligence be used. He has nothing but a personal remedy against the seller. Instead of *let the buyer beware*, I would say let the *owner take care of* his property.

It remains to consider briefly the liability of an agent or factor, and

1. As to third persons: If an agent does an act or makes a contract unauthorized by his principal, though in the name of his principal, he is personally liable. Thus, if a person employed to bid at a public sale at a limited price exceed his authority, he is considered as making the purchase on his own account, and may be sued as the purchaser. So when a warehouseman, contrary to orders, forwards goods to a consignee, though he inserted it in the bill of lading signed by the carrier that the consignee should pay the freight, he was held personally liable for the freight to the carrier. So when there is no certain responsible principal—as when a committee appointed at a public meeting contracted for a dinner, they were made to pay the bill. The question how far an agent, who has acted within the scope of his powers, is personally liable, has frequently arisen, and in some cases is not without difficulty. Thus in one case a charter-party was entered into by a person acting on behalf of the owners of the ship, almost all the covenants in which were expressed to be made by him as agent for the owners; but the owners were not parties

nor were they named in any part of the instrument. At the conclusion the charter-party said, "for the performance of all the covenants before mentioned, the said parties respectively bind themselves personally each to the other." It was held that the agent was personally responsible for the covenants. So it is a universal rule that a man who puts his name to a bill of exchange or promissory note, thereby makes himself liable, unless he states on the face of the bill that he subscribes it *for* another or by procuration of another, which are words of exclusion. When, however, the agent at the time of the contract names his principal, the principal is responsible, not the agent. When one contracts as an agent, and it is understood that the principal *only* is to be looked to, the agent is not liable to an action. To make the agent liable against the intent of the parties would be a violation of the contract. In contracts entered into by word of mouth, this is the simple, universal, and intelligible rule. In contracts in writing, and especially under seal, where the covenant or contract is made in the agent's own name, even though his agency be known, except in the case of agents for government, then in general the agent is personally liable, unless something on the face of the paper excludes it. If he executes in the name of his principal and as his agent, he is never liable. Thus it was held that an action would not lie against the officers of a corporation who signed and sealed an instru-

ment in the name of the corporation. "In general," said the Court, "it is true that there is a distinction between contracts that are entered into on the part of government by its agents and those which are entered into on the part of individuals or corporations by those who represent them. In respect of the first it may be safely asserted, that whether the contract be by parole or by deed, the public faith is exclusively relied on, whenever the agent does not specially render himself liable. In respect of the second, where the contract is by parole, the agent is liable only when he had no authority to bind his principal; but the agent of an individual or corporation, covenanting under his seal for the act of his principal, although he describes himself as contracting for and on behalf of his principal, is liable on his express covenant, whether he had the authority of the person whom he thus professes to bind or not. * * * But there is a striking and substantial difference between the covenant of an agent who describes himself as contracting for his principal through the means and by the instrumentality of an agent." (11 Serg. & Rawle, 126.) The following conclusions may, it appears to me, be deduced from the authorities upon this head: 1. A covenant under seal, made by the agent in his own name, though he may annex his designation as agent and the name of the principal, will bind him personally, whether he had authority or not; but not when he covenants in the name of his principal.

2. In verbal contracts or written contracts not under seal, if it appears that the contract was with the agent as such, the principal being known or declared at the time and the credit given to him, the agent is not responsible unless in point of fact he assumes to act without authority. 3. But if he contract without naming his principal, though he may add the designation of agent, and his principal was not declared at the time, he will be personally liable. 4. If an agent draws or indorses negotiable paper without naming his principal on the paper, though as to the original party he may show that he made known his principal and contracted on his credit, and be discharged as to him, yet he will be liable personally if the note should come into the hands of a *bona fide* holder for value.

The next topic is the liability of agents to their principals. It is the duty of a factor to follow implicitly his instructions; in the absence of such, in the exercise of a sound discretion to conduct himself according to the ordinary course of business and the usages of trade. When instructions are given, but a state of things arises evidently not foreseen, and which renders the instructions inapplicable, the agent is then to act according to his best discretion, and will be saved harmless himself, even should a loss ensue.

It is the clear duty of an agent to keep the property of his principal, whether it be goods or money, unmixed and distinguishable from his

own or others. This principle is applied in many forms. Thus, if an agent, *to collect a debt*, take a note from the debtor in his (the agent's) own name for the price, he is liable to his principal just as if he had received the money. When an agent *to sell*, who may, according to the usual course of business, take a note in his own name for the price, takes a note from the purchaser in which he adds to the price a debt due to him individually, he makes thereby the whole his own. So where commission merchants took the purchaser's note, and had it discounted for their own use, and afterwards, in pursuance of an agreement made at the time of the sale, renewed the note from time to time, till the purchaser became bankrupt: a custom was set up to sustain this practice, but it was repudiated by the Court. The principal is entitled to the produce of the discounted notes, and when the agent, instead of remitting it to him, employs it in his own business, he cannot insist that the accommodation was at the risk of his principal. (6 Watts & Serg. 44.)

Another plain duty of an agent is to keep the principal fully and promptly informed in regard to the business intrusted to him. Thus, when the agent sells on credit, gives notice of the sale, and credits his principal in account with the amount, but omits to give him notice of the non-payment of the note at maturity, the agent is responsible. He is *prima facie* responsible for the whole debt, though he may reduce his liability by

showing that in no event could the whole have been recovered. It would seem, however, that while the general rule certainly is, that for an omission to keep the principal regularly informed of the agent's transactions, and the state of the interests intrusted to him, the damages are to be proportioned to the actual loss, yet when the information transmitted is such as may induce the principal, in the adaptation of his operations to his means, to rely on an outstanding debt as a fund on which he may confidently draw, the agent makes the debt his own.

An agent who is sued by his principal cannot set up an outstanding claim in a third person, unless he has received notice of such a claim; and a payment, or in some cases, even a credit given to the principal in such a way as to put the agent in a worse condition than he was before, will protect him against such adverse claim. A necessary qualification of this doctrine is, where the agent obtains the money fraudulently; then a payment over to his principal, without notice, will not avail him.

A factor by the law merchant, contrary to the common law as to other bailments, has a general lien on his principal's goods in his possession; that is, not a particular lien on each invoice for the advances, expenses, &c., incurred on account thereof, but a lien on all his principal's goods for whatever balance may be due him on settlement of accounts. It is not, however, every agent who

has such a lien, but it is confined to one who is a factor properly. The Act of Assembly, before referred to, provides that "whenever any person intrusted with merchandise, and having authority to sell or consign the same, shall ship or otherwise transmit the same to any other person, such other person shall have a lien thereon:—1. For any money advanced or negotiable security given by him on the faith of such consignment to, or for the use of the person in whose name such merchandise was shipped or transmitted: 2. For any money or negotiable security received for the use of such consignee, by the person in whose name such merchandise was shipped or transmitted. But such lien shall not exist for any of the purposes aforesaid, if such consignee shall have notice by the bill of lading, or otherwise, before the time of such advance or receipt, that the person in whose name such merchandise was shipped or transmitted, is not the actual owner thereof." This gives the consignee of a factor to sell, a lien, as well as the consignee of the owner.

The power of an agent is always revocable at the pleasure of the principal, unless it be accompanied with an interest in the agent which renders it irrevocable. Thus a power given to a creditor to collect a sum of money, or dispose of property to his own use in payment of a debt, is irrevocable. In general, all persons who act by authority derived from others, may proceed to execute the business intrusted to them until notice of the

revocation of their authority; and their acts between the time of the revocation of their power and of their receiving notice of such revocation, are good. So, though the death of the principal is in law an absolute revocation of the agent's powers, the acts of an agent done after the death of his principal, of which he was ignorant, are binding.

LECTURE V.

ON PARTNERSHIPS.

Definition—Partnerships General—Special—Limited—Partnerships as to third Person—Interest in Profits—Commissions on Profits—Power of each Partner to Bind the Firm—By Instrument under Seal—Guarantee—Judgment—Partnership Note given for Separate Debt—Delegation of Authority to Clerk or Agent—Express Notice by Partner—Partners Ostensible—Nominal—Dormant—Limited Partnerships—Marshalling of Assets between Partnerships—Creditors and Separate Creditors—Executions against Partnerships—Dissolution of Partnership—Death—Bankruptcy—By the Will of Either Partner—General Assignment—Notice of Dissolution—Power of Partners after Dissolution.

THE contract of Partnership whereby two or more persons agree to put their property or labor or credit into a common stock, for commercial or business purposes, gives rise to many curious and important questions. A partnership may be general, special, or limited. A general partnership is one which comprehends whatever business the partners may choose to engage in. A special partnership is one which is confined by the terms of the agreement to some particular kind of trade

or business. A limited partnership is a partnership formed under the provisions of the Acts of Assembly of Pennsylvania on the subject, the distinguishing feature of which is that the responsibilities of one or more of the partners is limited to the amount of capital embarked by him or them in the concern.

Partnerships may be further divided into partnerships as between the parties themselves and partnerships as to third persons. Parties may of course make what agreements they please as between themselves. But in general it may be stated that an agreement between two or more persons to share the profits of any business or avocation, makes them liable as partners to third persons, even though it may be stipulated between them that losses shall not be borne in the same way. If it be agreed that A. shall furnish all the stock, and B. contribute his services, in consideration whereof he shall be entitled to one-half the profits, without being subject to any part of the loss, it is all very fair and very well as between A. and B. But as to the world, who have no means of knowing the secret agreements of partners, such a condition is not to be permitted. The partnership creditors trust to the partnership stock, and therefore no man shall be allowed to lessen that stock by taking part without incurring the responsibility of a partner. It is of importance that creditors should not be deprived of that fund to which they looked for payment, and to

which they had a right to look, as it was the visible sign held out to them, by which they were to judge of the amount of the partnership property and the credit to which it was justly entitled. Every man who trusts the partnership increases this fund, upon the faith of its being applied in the first instance to pay partnership debts, and therefore no man shall be suffered to diminish it, under the pretence of taking part of the profits as a compensation for his services, without being himself responsible in case of loss. This principle may bear hard upon a man who never intended to assume such responsibility, but it is founded in good policy and has the effect of preventing fraud. When the agreement is silent there is often room to doubt as to the precise relation in which the parties stand to each other, and then a joint interest in the stock is considered as a decisive circumstance; but when the agreement explicitly declares that there is to be no partnership, then, however it may be as to third persons who deal with the parties, it is perfectly plain that between themselves the law permits them to determine their respective interests by their own stipulations: that is a matter with which third persons have no concern. The contracts of men are laws prescribed by themselves to govern their transactions with each other, which, as long as they interfere not with morality and the interests of third persons, are of conclusive obligation on the immediate parties to them.

Although a direct share of the profits renders persons liable to strangers as partners, yet a distinction has been firmly established which practically has almost destroyed the principle; so that where parties choose, by merely varying the form of the agreement, they may actually receive a stipulation dependent upon and proportionate to the profits without being in fact liable to losses. A commission on profits is distinguished from a direct share of the profits themselves. The Supreme Court of this Commonwealth have recognized this distinction in several cases, although with some reluctance. "The rule," said the Court, "which declares that all who participate in the profits shall be held liable as partners, is founded in public policy, and it is particularly strange that it should have been relaxed in cases like the present. How a commission on profits can be distinguished from an interest in the profits, as such, we are at a loss to comprehend. The profits cannot be ascertained before the partnership is settled; and then a party, under a claim to commission, is entitled to what? To a compensation equal in amount to so many hundredths of the sum of the profits. It is impossible to discover any difference but what is found in the terms between a dividend and a commission; yet this difference, flimsy as it is, seems to be firmly established." (15 Serg. & Rawle, 137.) In a recent case this distinction was recognized and carried out in the broadest manner. An

agreement was made by a manufacturer to furnish wooden axe handles made to order to a country merchant at a tariff of prices to be paid out of the store on the proceeds of the handles, the manufacturer finding the labor and stuff, and receiving a further compensation for skill and the rent of the storehouse in the form of a commission of fifty per cent. on the net profits of the whole: it was held not to constitute a partnership. Said C. J. Gibson: "It has been so often and so invariably ruled in England and America that a commission on profits is not such an interest in the concern as constitutes a partnership, that the point is at rest. What staggers the mind, in this instance, is the apparent shallowness of the distinction, when it is considered that a commission of fifty per cent. is no more nor less than an equal division of the profits; but it must not be forgotten that the distinction is an arbitrary one, resting on authority, not principle, and that whatever be the proportion, the relation produced by a compensation in the form of a commission is in every instance the same." (1 Barr, 255.)

But though persons may not be partners as between themselves, and though they be not directly interested in the profits, or indeed have no interest at all, still if they hold themselves out, or suffer themselves to be held out as partners, and credit is given to them in consequence of it, they will be liable as such. Their acts and declarations are the evidence in general by which this

liability is established. The successive acts and declarations of each of several persons sued as partners, showing their partnership, are equivalent to a joint declaration by all, and may be given in evidence separately—that is, the declaration of each to charge himself—so as to make all liable.

Each partner is in law the general agent or attorney of the others, with full power to bind them by all acts and contracts within the scope of the partnership business; and they will be bound notwithstanding any private agreement between them to the contrary. The liability for the acts of each is not confined strictly to lawful acts and contracts; but even for wrongful acts when committed in the course of the joint business. Thus, what in law is technically called a conversion—that is an appropriation by use or claim of right of the goods of another, which came into the possession of the firm on joint account—is the conversion of all, and subjects them all to a recovery in damages of the value of the property.

In general, however, one partner *cannot* bind the other by an instrument under seal, unless the other expressly assents to, is present when it is executed in the joint name, or subsequently ratifies it: and that although it be a transaction in the course of the business of the firm, and although the benefit of the transaction accrued to the partnership. The law of partnership is part of the law merchant, which has respect exclusively to the business of commerce, and as sealed in-

struments do not ordinarily enter into it, the authority of partners being limited to the scope of the trade is held to be incompetent to the execution of them. There may indeed be a partnership to carry on a business not purely commercial; still, however, the authority of the partners is regulated by the usages of trade. The measure of this authority allowed by the law merchant, being graduated to the exigencies of commerce by experience, is the wholesome and convenient one, nor ought it merely for an apparent hardship to be enlarged. Such an instrument under seal, however, of course binds individually the partner, who executes it. This rule, that one partner cannot bind his fellows by deed is not, however, without exceptions. When the act is an ordinary commercial act, and usually performed by a sealed writing, the partnership will be bound. Thus a custom-house bond and a release of a debt are acknowledged exceptions. Indeed, a general assignment of all the partnership effects, thus executed by one partner, has been held by the Supreme Court to be valid and effectual. (5 Watts, 22.) Among the powers most ordinarily exercised by partners is that of disposing of the joint stock or merchandise. It is admitted that he can sell part without the actual consent of his associates, and the policy of limiting that right is not very apparent when the transaction is concluded in good faith. And when there has been such a disposition, whether

of the whole or of a part, when the property has been delivered, it matters not whether the instrument of transfer be under seal or not. The principle that one partner cannot bind his copartner by deed, only holds in executory and not in executed contracts; as, for example, when one partner attempts to bind his copartner by a bond for the payment of money, or the performance of a collateral condition. It would be a strange misapplication of this principle, which seems already to have been extended far enough, that when a partner, in the regular course of business, sells an article by a contract under seal, it should not bind the firm: and further, that even when the article is delivered in pursuance of the contract it may be avoided. It has been decided that a release is good notwithstanding a seal, and certainly a seal would not destroy the efficacy of a receipt. By the execution of a contract of sale or assignment consummated by delivery of the article sold or assigned, the property is transferred under the general power of disposition possessed by each partner, and cannot therefore be avoided by the fact that the instrument of writing which is the evidence of the agreement, is under the seal of one of the partners only.

A guarantee by one partner in the name of the firm not in the regular course of their business, will not bind the other partners, unless it be afterwards adopted and acted on by them. The law is so well settled; and it comports with all justice

and reason that it should be so settled. A partner cannot enter into any engagements binding the firm unconnected with and foreign to the partnership, and when a person deals with one of the partners, in a matter not within the scope of the partnership business, the intendment of law is, that he deals with him on his private account, notwithstanding the partner may use the partnership name, unless there be some circumstances in the case to destroy that presumption. There would be no safety in entering into a firm, if the authority of the partner was not confined to the regular line of business in which they may be engaged. Thus, where two partners, having a judgment, one of the partners assigned it to a third person, and guaranteed the payment of it, it was held that an action could not be supported against the firm on such guarantee, without proof that both partners assented to the making of it, or knowing it, did not dissent. It may, however, be a part of the business of a firm to guarantee, for a consideration, and then the act of one will bind all.

A partner cannot bind his copartners individually by confessing a judgment. A partner has power to dispose of the joint effects by his separate act, and that he may not bind the firm by submission to arbitration or confession of a judgment, is because it would bind the persons and separate estates of the members, and thus transcend the limits of partnership authority. But a judgment against a single partner, as the repre-

sentative of the firm, may be satisfied by execution out of the joint effects. The judgment confessed, therefore, stands valid against the party confessing it, and also against the partnership property, but is void as to the other partners, and cannot be satisfied by execution upon their separate property; yet the admission of a debt by one partner, made while the firm is in existence, is evidence, upon which an adverse judgment may be obtained by the verdict of a jury, which will be binding personally on all the members.

A partner cannot make the firm responsible for his separate debt. If he gives or endorses negotiable paper, in the firm name, for his private purposes, a *bona fide* holder without notice may recover upon it against the firm; and in all cases the signature of the firm in the handwriting of one of the partners is *prima facie* evidence of the authority of all. A partner cannot pay his separate debt with the joint funds, even though the creditor may not suspect a misapplication; for the wrong may be redressed without prejudice to any one. But even in the case of negotiable paper, the holder who omits to inquire into the true nature of a transaction which does not fall in with the current of trade, will not be considered as *bona fide*, and entitled to recover against the partnership. It was held, therefore, that an indorsement by a partner of his separate accommodation note, with the name of the firm, is

a sufficient indication of the nature of the transaction to make it the duty of the bank or individual, who discounts it, to inquire into his authority to use the firm name for the occasion, unless there are circumstances from which the authority can be implied. The indorsement of accommodation paper is not the ordinary business of a partnership; nor is it a necessary or legitimate incident of it. Doubtless a few merchants have made it a part of their business to indorse for a premium, and thus take the risk of the maker's insolvency. That firms, like individuals, do sometimes step out of their way to accommodate a neighbor, is undoubted; but these acts of reciprocal kindness are no part of a merchant's or manufacturer's business. When nothing has been done by a firm to mislead the commercial community, it is certain that all who deal with it are bound to know the nature of its business, and consequently the extent of the authority of its members. On the other hand it is just as clear that it may, by its bearing, give them an implied authority to act in matters beyond the confines of its business. By habitually sanctioning these indorsements for the accommodation of particular individuals or houses, it may give them an authority to continue the practice; as a master, who sanctions contracts made by a servant in his behalf, gives him authority to contract debts for him prospectively.

It is as yet an unsettled question whether a

single partner can delegate to a clerk or agent the general power to bind the firm, though he may constitute an agent or attorney to collect a debt or to transact any particular business. It is well settled that one partner cannot, without the consent of the others, introduce a stranger into the firm; nor can he, without such consent, make the other partner a member of another firm. The relation of partnership, being contracted in reciprocal reliance on the personal qualities of the parties, is a confidential one; and one of them cannot introduce a stranger into the firm without the consent of the rest, or delegate his power to a person on whose qualities no such reliance has been placed. A general assignment by one partner of all his interest is a dissolution of the partnership; because, as his interest in the capital stock is liable to his separate debts, his creditors are entitled to it, without being involved in the risk and responsibilities of a partnership. And the converse of the proposition is equally true. Their trustee cannot involve the solvent members of the firm in a partnership with him without their consent.

Finally, under this head it has been determined, that one partner may discharge himself from liability by giving express notice to any customer or other person not to trust one or more of his copartners. The power of one partner to bind the others is not essential to the constitution of a partnership. In most, if not all cases, it is but an

implied power, and seldom, if ever, expressly provided for or given by the terms of the partnership agreement. It would, therefore, be strange if the exercise of it could not be expressly provided against or forbidden by any one member of the firm, so as to protect himself against claims created contrary to his assent and express direction, by one or more of his partners, after notice given by him to the party making the claim not to trust or credit his partners, or any of them, on his account, without his express or direct authority to do so.

Partners are either ostensible, nominal, or dormant. An ostensible partner is one who suffers his name to be used, and himself to be known as interested. A nominal partner is one who, without having any interest, suffers his name to be used. A dormant partner is one who, having an interest, does not allow himself to be held out to the world as a partner.

It has been supposed that there is a difference between a secret and a dormant partner. Whenever the adopted name or style of the firm announces to the world that there are other partners besides those whose names are used, for example, by the words company, sons, brothers, &c., the partners in such firm are not perhaps strictly dormant. When, however, the name of one or more partners only is used without any such general designation added, the other partner is dormant, even though it may be generally known

that he is such. Whether known to few or many is of no moment. It must, in the nature of things, be known to some book-keepers and others in the confidence of the firm, and if they divulge the fact, such publication certainly will not be allowed to affect the relations of the parties. In legal consequence there is believed to be no difference between a dormant and a secret partner.

There is no doubt that a dormant partner is liable for the debts and engagements of the firm, though he was not known to be so by the creditor at the time the debts were contracted, or the engagements entered into, and of course no credit given to him. The credit is supposed to be given as well to the ostensible partner, as to those associated with him, upon the ground that he is entitled to a share of the profits. When, during the continuance of a partnership, the ostensible partner carried on the business of the partners in his own name, the same name in which he transacted his private business, and in that name contracted a debt for money borrowed, but it did not appear whether the money was borrowed for the partnership or for his private use, it was held that in the absence of evidence the presumption of law is, that the loan was made on the credit of the partnership business. A dormant partner, however, is not responsible for the debts of the firm contracted after he has ceased to be a partner, but before public notice is given of the dissolution of

the partnership. When one deals with persons who are publicly known to be partners, he trusts to them only, and not to another partner who is not known. Nevertheless, the secret partner is chargeable, because it is not fair that he should withdraw his share of the profits from the partnership stock, and thereby lessen the fund to which the creditor trusted, without being responsible for the debts of the house. But when he has ceased to be a partner, there is no reason why he should be responsible for debts subsequently contracted, because he draws nothing from the fund of the known partners, nor are the debts contracted on his credit. The case of known or ostensible partners is very different. The creditor, who deals with them, trusts to all; and therefore has a right to hold all responsible until he receives notice that some of them have ceased to be partners. The liability of a dormant partner to creditors may be avoided by proof of fraud in the formation of the partnership, if no part of the funds have been received by such dormant partner; but the fraud must be actual fraud. It is not sufficient for him to show that the other party was largely indebted at the time of entering into the partnership without proving inquiry into the circumstances and imposition practised upon himself. Whatever fraud or imposition there may be between the parties when they are known or ostensible partners, cannot affect third persons, who are presumed to contract on the faith, and

with a knowledge of the partnership. But that is not the case of a dormant partner. There, third persons do not credit the firm, but the individuals with whom they deal. They then receive no injury. The reason why a person becomes by implication and operation of law, clothed with the character of a partner, and as such liable to third persons, is that by the effect of the agreement for participation, the party participant takes from the creditors a part of that fund, which is the proper security to them for the satisfaction of their debts, and upon which they rely for payment. Another reason assigned for subjecting a dormant partner to responsibility is, that if he were exempted he would receive usurious interest for his capital, without its being attended with any risk. The rule then must be taken with this qualification, that if the dormant partner has actually received part of the profits, or any part of the capital, then he is liable to third persons, although there may have been fraud in the contract of partnership. But when there is such a fraud as to avoid the contract of copartnership between the parties, and when no part of the funds have been received by the dormant partner, he is not liable to creditors, who give credit not on the faith of the partnership, but of that of the individuals with whom they contract. Third persons ought to be in no better situation than the fraudulent partner, who clearly would have no right of action against the innocent partner.

By the Act of Assembly of Pennsylvania of 21st March, 1836, "An act relative to limited partnership," this peculiar species was authorized for the transaction of any agricultural, mechanical, mining, transporting of coal or manufacturing business within the State, but with an express exclusion of banking or making insurance. Each limited partnership must consist of two kinds of partners: *general partners*, liable *in solido*, or personally liable in full, and *special partners*, "who shall contribute in actual cash payments a specific sum as capital to the common stock, and who shall not be liable for the debts of the partnership beyond the fund so contributed by him or them to the capital."

In order to form such a partnership it is necessary that the partners should severally sign a certificate, which shall contain: 1. The name or firm under which such partnership is to be conducted: 2. The general nature of the business intended to be transacted: 3. The names of all the general and special partners interested therein, distinguishing which are general, and which are special partners, and their respective places of residence: 4. The amount of the capital, which each special partner shall have contributed to the common stock: 5. The period at which the partnership is to commence, and the period at which it will terminate. The certificate must be acknowledged and recorded in the office of the Recorder of Deeds, in the county or counties

where the business is intended to be carried on, and must be accompanied with an affidavit by one of the general partners, "stating the sum specified in the certificate to have been contributed by each of the special partners to the common stock, and to have been actually and in good faith paid in cash." The terms of the partnership are required to be published in two newspapers, to be designated by the Recorder, for six weeks after the registry. The act itself, and its supplement of 16th April, 1838, must be referred to by those desirous of learning in detail all the provisions which are contained in it upon this subject. They cannot, with regard to our time, be recited, nor would a mere recital of them enable you to understand them in all their bearings. It may be laid down as a general principle, that all the requisites of the Acts must be complied with, otherwise the partnership, the intention of the parties to the contrary notwithstanding, will be a general partnership, and the special partners will be liable as general partners. It may be specified particularly: 1. That if the word "company," or any other addition to the names of the general partners in the style of the firm be used: 2. If any false statement be made in the certificate or affidavit: 3. If publication be not made as directed: 4. If it be not regularly renewed or continued in the manner prescribed: 5. Any alteration in the terms as set forth in the original certificate: 6. The use of the name of the special partner with

his privity: 7. Any interference of the special partners with the business of the firm: 8. Any preference of one partner over another, concurred in by the special partner—makes the partnership a general one, and subjects the special partner to full liability.

Until, however, there be some modification of this law—and whether such modification can be safely made, is another question—it appears to me that limited partnerships will not be likely to come into very general use, when capitalists may invest with still greater immunities in corporations. The act has environed the special partner with too many perils, and when everything has to be so nicely considered and adjusted, and the special partner has to be careful to do nothing but examine the books, and consult the general partners, and cannot out of doors transact any of its business, lest it should come within the somewhat indefinite term "interference"—careful capitalists would almost as soon, if not preferably, embark at once as ostensible or dormant partners.

We come now to consider briefly, how the creditors of the partnership and the private creditors of the individual partners, stand in regard to their right of recourse to the joint effects of the firm for the payment of their respective debts. The general principles adopted by the Courts in Pennsylvania may be thus briefly stated. Each partner is considered as the owner of the entirety, not each of a certain proportion; and being personally

bound for all the debts of the firm, is interested to have the partnership property appropriated in the first place to pay the partnership debts. This is called his equity; because partnership accounts having been drawn into the vortex of the Court of Chancery in England, it is from the language of that Court we draw our nomenclature upon this subject. But equity is part of the law of this State, and we might with the strictest propriety say that it is the legal right of each partner to have the firm debts discharged from the joint stock before any part of it is permitted to go to any of the partners, or what is the same thing, to pay their separate creditors. The courts enforce this right wherever a collision occurs between the joint and separate creditors, even where the interested partner is not the party demanding it. Yet it is well settled that the joint creditors have no right or priority in themselves. They have no lien by which the goods can be followed into the hands of the separate creditors, if they have been so appropriated with the consent of the firm. But the joint creditors have also a right to come upon the separate estate of each partner; and when the joint funds have been exhausted without satisfying all the joint creditors, upon what principles are they to be let in on the separate estate of each partner?

In England, in the marshalling of partnership assets in the Court of Equity, as the joint creditors are allowed a priority of payment from the joint

property, it has been thought just and equitable to give the separate creditors a similar priority out of the separate funds.

The rule as established in this State is somewhat different. It is evident that the principle of distribution of the English Courts, though simple and convenient, does not secure an equal and *pro rata* proportion of joint and separate estate to the different classes of creditors. To allow the joint creditors a preference on the joint funds, and then to come in *pro rata* on the separate, would also be a violation of strict equality. Where, therefore, the partnership is insolvent, whatever percentage on the debts the joint creditors receive from the joint fund, to that amount the separate creditors are entitled to a preference upon the separate estate, and for the balances which may remain both classes are entitled to receive an equal or *pro rata* dividend of what remains of the separate estate. Thus suppose A. and B. are partners, and the partnership is insolvent, and A., one of the partners, has separate property and private debts. Suppose the partnership creditors receive twenty cents in the dollar from the joint assets. Then A.'s private creditors will receive in the first place twenty cents in the dollar from his separate estate, and the remainder of the separate estate will go to pay the remaining eighty cents in the dollar, owing both to the joint and separate creditors, as far as it will go *pro rata*. This puts all the creditors of A. on an equal footing, so far as concerns his

estate, his whole separate property and his whole interest in the joint property being divided among all his creditors equally in proportion to the amounts respectively due to them. As to the portion which the joint creditors receive from that part of the joint property belonging to B., the separate creditors of A. have no reason to complain, because they trusted A. only; but the joint creditors trusted both A. and B.

When an execution is issued upon a judgment against a firm, and the joint assets are seized and sold and converted into money, the regularity of the proceeding is unquestionable. The joint creditor has secured a prior lien over all other creditors, and is entitled to be paid. On the other hand, when an execution is issued upon a judgment against one of the parties, all that can be levied on and sold is the interest of the partner defendant in the concern; that is, his share or proportion, after all the partnership debts are paid. The sheriff, although he may have a right to seize the stock for the purpose of making an inventory, has no right to take it out of the possession of the other partner, and has no right to deliver the stock or any part of it to the person, who may become the purchaser under the execution. All that he sells, and all that the purchaser acquires, is an incorporeal right—the right to demand an account. He is a tenant in common with the remaining partner, and can go into a Court of Equity, have a receiver appointed, the property

sold, the debts paid, and the account settled; and whatever, upon such settlement, the amount coming to the parties against whom the execution issued may be, that he will be entitled to receive as standing in his shoes; or, if he prefer it, he may content himself with an action of account render against the other partner. It will be seen at once by this statement, how great a sacrifice is likely to take place, upon a sale under execution of the separate interest of a partner in a concern. It is but the uncertain chances of a lawsuit, which is put up and sold, and who will be found to bid! What an advantage does it give to those, whom the partners may choose to make acquainted with the true state of their business! Injustice is done all around. It is a place in the law which sadly needs amendment. The levying of an execution against either partner, should be, *ipso facto*, a dissolution; and the creditor should be compelled himself to proceed to enforce a winding up of the concern. In the meantime, it exhibits in a strong point of view how careful partners should be not to incur private debts, which may involve them, as well as their copartners, in such serious loss and embarrassment.

It remains to treat of the dissolution of a firm, and some of its consequences. A partnership is dissolved by the expiration of the time limited for its continuance by the terms of the original agreement, by the mutual consent of the partners, or by the act of any one in withdrawing from the

firm. It may also be dissolved by the death or bankruptcy of any one of the partners.

In all cases, except dissolution by death or bankruptcy, a partnership is held to continue as to third persons, until due notice of its dissolution. But it may be continued even after death, if such be one of the articles of the original agreement. In a case in which this question arose, C. J. Tilghman remarked, "Where no time is fixed for its duration, either partner may dissolve it at pleasure. And unless there be an express stipulation to the contrary, it is dissolved by the death of either party. But I can find no authority for the position that it is dissolved by death contrary to express stipulation. By the Roman law it might have been so. But in the present state of commerce, we are not to take our rules from the Roman law. Even France, who in general has adopted the civil law, has rejected it in this particular. It is provided by the Code Civil that partnership may be continued after death, when such is the agreement of the parties. There are conveniences and inconveniences, fix this rule how you will. If you say that the partnership shall be dissolved by death against the agreement of the parties, you may deprive the family of the deceased of all the profits of an establishment which had been erected at great expense, and is beginning to reimburse those expenses with interest at the moment of death. On the other hand, by continuing the partnership, it may hap-

pen that a capital which had been established by many years of prosperous business, may be sunk by the misconduct or misfortune of the surviving partner." (11 Serg. & Rawle, 41.)

In the case of a dissolution by death, it is the surviving partner or partners alone upon whom devolves the right and duty of disposing of the property, collecting the assets, and paying thereout the debts; the representatives of the deceased have no right to do so; all that they can do is to call upon the surviving partner or partners to render an account.

It seems that in this State, though a partnership may have been formed for a definite period, it may be dissolved by either before that period arrives. There is no such thing as an indissoluble partnership. It is revocable in its own nature, and each partner may, by giving due notice, dissolve the partnership as to all future capacity of the firm to bind him by contract, and he has the same legal power, even though the parties had covenanted with each other that the partnership should continue for such a period of time. The only consequence of such a revocation of the partnership power in the intermediate time would be, that the partner would subject himself to a claim of damages, for a breach of the covenant. And this, with the fact that it would be contrary to their own interest to dissolve the connection without cause, will, in most cases, be an effectual security. It is for the public interest that no

partner should be obliged to continue in a partnership against his will, inasmuch as a community of goods in such a case engenders discord and litigation. Besides, a partner might be ruined beyond redemption, if his copartner became wild and extravagant in his speculation, to say nothing of peculation and dishonesty. He has the power, therefore, to save himself by withdrawing, and it will be for a jury of his country to say whether he had just cause, and what amount of damages, if any, he shall pay for his breach of the contract of partnership before the expiration of the time agreed upon. And this is also the doctrine of the civil law, which holds that each partner has a power to dissolve the connection at any time, notwithstanding any agreement to the contrary, and that such a power results from the nature of the association.

There is considerable doubt as to the effect of a general assignment by the firm, or one of its members. The better opinion seems to be that in the former case, where there is a general assignment, it is evidence of a dissolution, but is not necessarily a dissolution. If the partners continue to trade and do business together, it will be a continuation of the old firm. In the latter case of a general assignment by one of the firm it is a dissolution, unless otherwise expressly agreed. It seems reasonable to infer the dissolution of a partnership from an act by which all its objects are alienated and transferred; but barely exe-

cuting an assignment of the stock in trade may be for the benefit of the concern, and may increase rather than diminish their ability to continue their business. Our Supreme Court have expressly decided that a partnership is dissolved when one of the partners sells his share to a stranger or one of the firm, unless otherwise provided by agreement. It was held to be clear that a partner cannot, consistently with a continuance of the partnership, retire from the firm or introduce another into it, without a provision for it in the articles, or at least without subsequent ratification by all the partners. The contract is founded in personal confidence reposed by the partners in each other, which they may be unwilling to repose in a substitute; and it is for this reason that an involuntary transfer by judicial sale of a partner's share in the concern has been held to dissolve it. It has been decided that a partner cannot transmit his capacity to act as such by will or intestacy without express provision in the articles; and bankruptcy is an immediate dissolution, because it vests his share in his assignees. There can be no doubt that the same effect would be produced by a voluntary transfer to a stranger, and there is no reason to distinguish it from such a transfer to one or more of the copartners. The partners themselves may order it otherwise by a provision in the articles, or by subsequent agreement; but they may do so on their own terms, and a power to transfer a part-

ner's share to a copartner, as well as to a stranger, must be executed in the manner and on the conditions prescribed. (8 Watts & Serg. 262.)

Though a partnership may be dissolved, as between the parties, it will continue as to the world until notice of the fact; that is, the liability of each partner for the acts of his copartners, in the name of the firm and within the scope of the business, will still continue. What, then, is sufficient notice of the dissolution, so as to discharge a partner from debts subsequently contracted in the name of the firm, without his participation or assent? The rule is, that notice of the dissolution, given in a newspaper printed in the city or county where the partnership business is carried on, is of itself notice to all persons who have had no previous dealing with the partnership. But as to persons who have had such previous dealing with the partnership it is not sufficient. It must be shown that actual notice of the dissolution was communicated to the party in some way or other. A notice in a newspaper is at best but an uncertain method of communicating the knowledge of a fact, since the party to be affected may never see the paper, or if he does, may not read all the advertisements; but still it is sometimes the only practical mode, and is, therefore, either allowed by the principle of the commercial law, or directed by Act of Assembly in particular instances. But where a firm has had previous dealings with others, it can know such persons, and

may send them specific notice, which is the best and most certain mode. No particular mode, however, is prescribed by law for communicating notice even to persons having had previous dealings; it is sufficient if in any way actual knowledge is traced home to them. Showing, however, that such a person took a newspaper in which a notice was advertised is not sufficient.

A partnership thus dissolved by death or otherwise, may still be held to subsist for certain purposes. Thus, if contracts have been made, and engagements entered into, which have not been completed at the time of the dissolution, the partnership is to be considered as existing for such purpose. However, a continuing agreement to do all work or business of a certain description, as to deliver all flour, &c., is not within this rule: such agreements are necessarily subject to the implied condition that the firm continues; just as such an agreement with an individual necessarily ends with his death. But an agreement to do a particular thing, which has been left unfinished at the death of a partner, would bind his estate. So it has been determined by the Supreme Court, that the death of one partner does not discharge the firm from subsisting contracts with an agent for a period of time not then expired: and if he be dismissed without cause before the death of the partner, the survivors are liable for his wages during the period contracted for. So when A. and B., commission merchants, received goods on

consignment for sale; then B. died, and A. sold the goods and became bankrupt, it was held that B.'s estate was liable to the consignor for the proceeds of the goods. The obligations, responsibilities and duties of the firm cover the process of winding up the concern by any one partner after dissolution, and by the surviving partner in case of dissolution in consequence of death. Upon the dissolution all the members are liable in their individual capacities for all the contracts and engagements of the firm existing at that time. If so, the estate of the deceased partner is responsible for all the contracts and engagements of the firm existing at that time.

In general, after dissolution and due notice given, the power of one partner to bind the firm is at an end. After dissolution they are not the agents of each other, except for the purpose of making good outstanding engagements. They cannot enter into a new contract or engagement for their former partner. Hence one partner cannot by any admission or acknowledgment, after the dissolution, revive a partnership debt so as to deprive the other partner of the benefit of the act of limitations, which bars the debt after the expiration of the period of six years. In many, and indeed in most cases, one of the partners is by agreement exclusively authorized to arrange their joint affairs, and to receive the partnership credits as the fund out of which to discharge the partnership debts. The other partner, in many cases,

is ignorant of the details of the business, particularly when he is acquainted with and satisfied with the result. It would be dangerous to say that, under such circumstances, his acknowledgment should charge the other partner; for it is to be remembered that the statute of limitations was not enacted to protect persons from claims fictitious in their origin, but from ancient claims, whether well or ill founded, which may have been discharged, although the evidence of discharge may have been lost. After settlement of the accounts many persons become careless of their vouchers, which may be lost by time or accident. To expose persons, in such situations, to the risk of being saddled with debts at an indefinite length of time, which may have been discharged, by the acknowledgment of a person ignorant of the fact of payment, or from insolvency and perhaps malice, reckless of the consequences, would be a very pernicious and dangerous principle. Persons so exposed are those whom the statute of limitations was intended to protect. It gives them a shield, of which they cannot be deprived without their own consent. Upon the same principle the promise of a partner, after the dissolution of the firm, to pay a note indorsed by the firm, but of which no notice of dishonor had been given, has been decided not to be binding upon the other partners. Nor has one of the firm, after dissolution, power to make a general voluntary assignment for the benefit of his creditors, against the express consent of his copartners.

In case of a dissolution, however, without any agreement as to the mode of liquidation, either partner may sell and convert into money such of the property as he may have in possession, and may collect and receipt for debts. He is, of course, liable to be called to account for all that he receives, and will be charged with all such sums in a general settlement. In general, however, it is for the interest of all the partners to commit the business of liquidation to one of their number; and he is thereby necessarily vested with certain powers for that purpose. Thus he may borrow money on the credit of the firm, for the purpose of paying the debts of the firm; and if the credit is given in good faith, though with a knowledge of the dissolution, and the money is faithfully applied to the liquidation of the joint debts, the creditor has a claim against the firm, and is not to be considered as a creditor merely of the partner borrowing. If by the agreement and terms of dissolution, it be provided that the firm name shall be used in winding up the business, and for the renewal of any notes given in banks, then all the partners will be bound by the use of it in a transaction connected with their business. So it has been held that a partner who, after dissolution, remains in possession of the store or place of business, and attends to the collection of the debts due to the firm, may give a note in the name of the firm for a debt due by the partnership, which will bind all the parties, although he may have no express authority to settle the business.

LECTURE VI.

ON SHIPPING.

Requisites of Valid Title to Ships — Custom-House Documents — Part-Owners—Liabilities of Owners and Mortgagees—Liens of Material-Men—Authority and Duties of Master, Mate, and Seamen — Seamen's Wages — Contract of Affreightment—Freight pro rata itineris—Of Maritime Loans—Bottomry—Respondentia.

WHATEVER may be the natural laws which have rendered it necessary that so large a proportion of water should be distributed over the surface of the globe, it was undoubtedly one reason of a wise Providence to facilitate intercourse and commerce between distant countries. Thus the productions of every different clime are interchanged among the inhabitants of the earth,—thus the varying powers of nature are most successfully subsidized to the sustentation and improvement of the race,—thus the advances in knowledge and civilization of the most refined nations are communicated to the less favored,—thus the world will finally be evangelized, and "the earth filled with the knowledge of the glory of the Lord, as the waters cover the sea."

A ship is the instrument of these wonderful results. All those contracts which are connected with the employment of ships in commerce, and the rights, duties, and liabilities of men, growing out of such contracts, are classed in the Mercantile Law, under the general denomination of SHIPPING.

Ships are personal property, and the rules which have already been adverted to, in regard to contracts of sale of merchandise generally, apply to vessels. A sale and delivery of a ship, without any bill of sale, writing, or instrument, will be good at law, as between the parties. As to creditors and third persons, possession in the vendee is necessary to secure his title, wherever such possession can be given. When the vessel is at sea, delivery of the muniments of title, if there are any, and possession taken by the assignee as soon as it arrives, are all that is required.

The Acts of Congress of the United States, in imitation of the policy of other commercial countries, have conferred many important privileges upon American-built vessels, and have made it necessary, in order to enjoy and preserve such privileges, that the ship should be registered at the custom-house; that all transfers should be in writing, and recorded at the same place. The register is made by the Collector of the Port to which the ship belongs, or in which she happens to be, and is founded on the oath of one of the owners, stating the time and place where she was built, or that

she was captured in war by a citizen as a prize and lawfully condemned, or forfeited for a breach of the laws of the United States. If the vessel be built within the United States, the ship-carpenter's certificate is requisite to obtain the register; and a certificate must be produced and security given that the certificate of such registry shall be solely used for the ship, and shall not be sold, lent, or otherwise disposed of. Upon a sale to a foreigner, the registry must be delivered up to the Collector of the district, if the vessel is within the United States, within seven days after the sale; and if the vessel is at sea or abroad at the time of the sale, within eight days after the master's arrival in the United States. Upon every sale to a citizen of the United States, and upon every alteration of her form or burden, her former certificate must be delivered up and she must be registered anew. In every case of sale or transfer, there must be some instrument of writing in the nature of a bill of sale, which shall recite at length the certificate of registry; and without it the vessel is incapable of being registered anew.

The English statutes absolutely require in all cases a transfer in writing, and that the certificate of the registry be truly recited at length in every sale of a British ship to a British subject; otherwise such bill of sale is declared to be utterly null and void to all intents and purposes. By the Acts of Congress, as it will have been seen, the only

consequence of a transfer not in writing, or if in writing not containing a recital at length of the certificate of registry, is that the vessel cannot be registered anew, and loses her privilege as an American vessel. Vessels under twenty tons burden are enrolled and licensed to be employed in the coasting trade or fisheries. In other respects the same rules apply as to registers.

Not only is a register or enrolment, and a bill of sale unnecessary as muniments of title, in all questions between parties not affecting the privileges of the vessel as an American bottom or otherwise, but the register is not of itself evidence of property, unless it is shown directly or circumstantially that it was made by the authority or assent of the party who is sought to be affected by it. With proof of such assent or authority, however, it is evidence, though even then not conclusive.

A ship, like any other article of property, may be owned by one person or by several persons in common. In the latter case they are styled part-owners. They are not, by such part-ownership, nor by a division of its freight or earnings, thereby made partners; although a ship, like any other valuable, may constitute part of partnership stock; and then the owners are not properly part-owners but partners,—the partnership being considered in such cases in all respects as an individual. It is so in regard to all other property. Part-owners

of a horse, who let out and divide its hire, are not partners so as to be bound up by each other's contracts: though if they hold it to sell and make profit upon it, they are. Thus each part-owner of a ship has a distinct, though undivided interest. He can only dispose of his own interest. Part-owners are held, however, by the law merchant, to have implied authority to bind each other by the purchase or order of whatever is necessary for the preservation and employment of the ship: as for stores and repairs. Where part-owners cannot agree as to the proper employment of the vessel, the maritime law has provided a remedy adequate to the exigencies of the case, and so guarded as to secure the rights and interests of all the parties. The maxim of that law is, that "ships were made to plough the ocean, and not to rot by the wall." It would be against good policy to permit dissensions between part-owners to prevent the active employment of what is ordinarily the most productive kind of capital. The majority in value of the part-owners have a right to the control and management of the ship—where no special agreement interferes—and may employ her how and when they please; but before they are permitted to send her on any adventure contrary to the opinion and wishes of the minority, they are compellable to enter into a stipulation, as it is termed, in the Court of Admiralty; that is, give sufficient security, in a sum equal to the value of the shares of the minority, either to bring in and restore the

ship, or pay the minority the value of their shares. When this is done, the ship sails wholly at the charge and risk and for the benefit of the majority. If the owners are equally divided, either party may in like manner compel the other party seeking to employ, to give security. It is evident, however, that it would often be much more for the common interest of all concerned, that the subject-matter of controversy should be exposed to a public sale, and the dispute thus ended. It has been questioned whether the Admiralty Courts in this country have jurisdiction to order a sale in such a case; and although it is settled adversely to the power in the English Courts, Judge Washington has maintained it, and his opinion finds support in the general rule of the maritime law on the continent of Europe, and in the convenience and often absolute necessity of the thing itself.

One of the owners is often appointed by the others to manage the ship for the advantage of all, and he is termed the ship's "husband." He has a general authority to bind the owners by his acts and contracts relating to the ship.

When a ship is chartered, or in other words, hired by the owner to a person or persons for a certain voyage, or for a particular period of time, the charterer becomes for the time the owner, and under all his liabilities as such. In a case which was decided by the Supreme Court of the United States, it was said: "The carrier may hire

his vehicle or his team or his servant, for the purpose of transportation, or he may undertake to employ them himself in the act of transporting the goods of another. It is in the latter case only that he assumes the liabilities and acquires the rights of a common carrier. So the ship-owner, who lets his ship to hire to another, whether manned and equipped or not, enters into a contract totally distinct from that of him, who engages to employ her himself in the transportation of the goods of another. In the former case he parts with the possession to another, and that other becomes the carrier; in the latter, he retains the possession of the ship, although the hold may be the property of the charterer, and being subject to the liabilities, he retains the rights incident to the character of a common carrier." (8 Wheat. 605.)

A question has arisen, and been much discussed in regard to the liability of a mortgagee of a ship, in whom the legal title is vested as owner, but who holds the title merely as security for the payment of money or performance of other collateral condition. The point was first presented for decision in the Supreme Court of this State, in a case, in which it was determined, that a mortgagee of a ship at sea does not merely, by delivery of the documents, acquire such a possession as to be liable to the master for wages accruing after the date of the mortgage. "That the master," said C. J. Tilghman, "has not a lien on the ship

for his wages unless it is expressly so agreed with his owners, seems to be as well settled as any principle of maritime law can be. But the mariners and the mate have a lien, and may libel the ship in the admiralty for their wages. The reason is that the master contracts with the owners on *their personal credit*, but the mariners and mate contract with the master on the credit of the ship. * * * But it is said that in the case before us the plaintiff is at least entitled to recover from the mortgagees his wages for all the time that he commanded the ship, *subsequent to the date of the mortgage*. It certainly is a hard case on the plaintiff, who seems to have little chance of recovering from the owner; but that cannot alter the law. He contracted with the owner, and there is no privity between him and the defendants. If the ship had come to the actual possession of the defendants, and they had retained the plaintiff in their service without any particular contract, the law would have raised an assumption. But the kind of possession, which was vested in the defendants by the mortgage and delivery of the ship's documents, is not sufficient to make them responsible. The plaintiff still acted under his contract with the owner; and if the debt for which the ship was mortgaged had been paid at any time before or immediately after her arrival, the property would have been revested in the owner." (8 Serg. & Rawle, 118.) And in a subsequent case, in which the same question

arose, Judge Sergeant remarked: "That the owners of a vessel are liable for supplies or necessaries furnished for her use by the orders of the master, where no other person has been expressly credited, is a principle long established. But who is such owner in any given case is a question on which there are to be found contradictory cases and fluctuating opinions in the reports. The later decisions seem, however, to agree, that one having the legal title only, without any interference in the management of the ship, or any right to receive her freight or earnings, is not responsible: whether the title is by bill of sale, or other sufficient conveyance, or whether it is by mortgage or other document in the nature of a pledge or security. Such persons are, it is true, in one sense, owners—that is to say, they have a valid claim or title to the property of the vessel, either in law or equity. But that is not sufficient. The owner who is responsible in such case is the person who, having some kind of claim or title, has the control or management of the vessel, and has the right to receive her freight and earnings. And the ground of the liability seems to be the common maxim, *qui sentit commodum sentire debet et onus* (he who enjoys the benefit ought to bear the burden), it being obviously right and just that he who enjoys the benefits of the vessel and controls her operations, who receives her gains, or has the chance of so doing, ought to pay debts incurred for the fitting out, supply, and navigation

of the vessel, which is to produce for him those earnings, and not a person who merely holds a right in her without profit or usufruct. It is for the former of these, and not for the latter, that the master is considered as agent, and competent to bind them by his orders for supplies furnished to the vessel." (4 Watts & Serg. 240.)

If repairs are made or necessaries furnished to a foreign ship, or to a ship in the port of a state to which she does not belong, the general maritime law gives the party a lien on the ship itself for his security, and he may enforce it by a sale of the ship under proceedings in the Admiralty Court. In regard, however, to necessaries or repairs in a port of the state to which the ship belongs, the case is determined entirely by the municipal law of that state. By the law of England, there is no such lien unless in the case of the shipwright, who has the possession of the vessel for the purpose of making repairs, and who, according to the principle stated in the Lecture on Bailment in regard to similar cases, has a particular lien, and a right to retain the possession until he is paid. If, however, he has worked upon the ship without taking possession, or he has parted with the possession which he once had, he has no privilege superior to any other creditor of the owner. We have, however, in Pennsylvania, an Act of Assembly of 13th June, 1836, by which it is provided that ships and vessels of all kinds built, repaired, or fitted within this Commonwealth, shall be sub-

ject to a lien for all debts contracted by the masters or owners thereof for work done or materials found or provided in the building, repairing, fitting, furnishing, or equipping of the same, in preference to any other debt due from the owners thereof. The lien shall continue during the time that shall intervene between the contracting of such debts, and the time when such ship or vessel shall proceed on her voyage next after the work done or the materials furnished as aforesaid. The lien shall exist in favor of the following classes of tradesmen and mechanics, and no others, to wit: carpenters, blacksmiths, mast-makers, boat-builders, block-makers, rope-makers, sail-makers, riggers, joiners, carvers, plumbers, painters, ship-chandlers, coppersmiths, brass-founders, coopers, venders of sail-cloth, and lumber-merchants; and by the subsequent Acts of 31 March, 1837, and 16 April, 1838, the benefits of the provisions of the Acts are extended to steam-engine and boiler makers, and to venders of copper sheathing. The remainder of the Act of 1836 is taken up in prescribing the mode of proceeding to enforce the lien, which is in the local State Courts, in a manner, conformed to the civil law and admiralty process, by libel and attachment, and sale of the vessel. All the claimants are authorized to join in one proceeding, and one definitive sentence or decree is given, comprehending all such debts as shall be duly supported. Finally, it is enacted, that if the proceeds of any

ship or vessel sold under such decree shall not be sufficient to satisfy all the liens against such vessel, the same shall be distributed *pro rata* among all the creditors, whose claims shall have been presented previous to the order of sale. Proceedings in the State Courts to enforce the liens thus given are not of frequent occurrence now, since it has been established that wherever the local law gives a lien upon a vessel, the District Courts of the United States have jurisdiction to enforce it, and may do so according to their own practice and rules of proceeding, without regard to the course marked out in the local law. The proceedings in that Court are so much more expeditious and summary, that suitors have most generally preferred that jurisdiction. But though the course of proceedings pointed out by the Act is not obligatory upon the District Court of the United States, yet the prescribed limitation of the lien is, and therefore, when the vessel proceeds on her first voyage, no admiralty process will be extended to enforce it beyond that limit. It may be assumed, too, that, acting upon the well-established principles adopted by the Federal Courts in other cases, the decisions of the Supreme Court of the State upon the construction of the local statute as to the extent and limit of the lien, as well as to the cases in which the lien exists, would be received as binding authority. In one case in the Supreme Court of Pennsylvania, it appeared by an article of agreement between

plaintiff and defendant, that plaintiff agreed to construct the hull of a steamboat scow, the St. Louis, to be delivered to the defendant some time in the month of March ensuing the date of the contract, to be paid for at various times in orders upon different individuals, and the balance by defendant's own notes to fall due in six months, and twelve months after the delivery. The delivery of the boat was delayed until June, at which time she was received by the defendant, who went on to complete her by furnishing her with an engine and equipping her for her ultimate destination, and in this condition she was libelled for a debt due to the builder, the plaintiff, the mere hull being all that the plaintiff contracted for and delivered. "If I contract," said the Court, "with another to sell and deliver me a steamboat at a day certain, there is no reason why he should have a lien on it after having parted with the property unconditionally, whether the boat be a new or an old one—whether it be finished or unfinished—provided it answers the description in the contract, or whether the vendor had himself purchased it, or built it with his own hands. The statute was not made for such a case. Mechanics and material-men may follow the product of their labor or materials wherever they can find it. But the owner of a boat built by himself sells it as he would any other chattel, on the personal credit of the buyer, when he expressly takes no other security. If the personal responsibility of the

buyer prove insufficient, the seller has made a bad bargain, and he has himself to blame for not having taken the proper precaution; but he cannot resort to the security provided by the statute for a different class of creditors." (6 Watts & Serg. 519.)

The master of the ship is appointed by the owners, and is an officer to whom considerable power is of necessity intrusted, and upon whom a corresponding responsibility is devolved. His authority over the crew is very great: a large discretion is accorded to him to enable him to maintain order and subordination on board. While he is held accountable for excess and cruelty, the courts are ever disposed to regard his exercise of authority with a favorable eye, and do not lend too ready an ear to the complaints of those, who are placed under his command. As we have seen, his contract is a personal one with the owner, and gives him no lien upon the vessel for his wages.

In respect to the ship, he is the general agent of the owner, and has implied authority to bind them by contracts relating to the employment of the ship. But in such case, the supplies furnished must be reasonable, the repairs necessary, or the money advanced for the purchase or payment of them wanted, and there must be nothing in the case to repel the presumption that the master acted under the authority of the owners. The lender in such case is bound to make due inquiry,

whether the supplies or repairs are necessary, and whether a captain has sufficient effects in his hands without resorting to a loan; but he is not bound to inquire into the state of the accounts between the owner and master.

But the power of the master is in many cases still more extensive as well over the cargo as the ship. When a ship is driven out of her course by stress of weather, the charge of the cargo devolves upon the master, whose duty it is to take proper care of it. In such case, the master has power to sell goods, which are damaged or of a perishable nature. But those which are in good condition, and not perishable, he has no right to sell without the order of the owners, to whom he is bound to give immediate information. It might, indeed, be of ruinous consequence, if the captain could, at his pleasure, sacrifice valuable goods, by exposing them to sale at an improper market, especially as there will never be wanting persons, whose interest it is to advise a sale, by which they will be sure to reap considerable profit. So, too, under his general authority, the master may bind the ship by charter-party in a foreign country, where the owner has no agent. He may sell part of the cargo, if it is necessary to enable him to carry on the residue to the port of its destination, or for such purpose he may hypothecate ship, cargo, and freight. It is incumbent upon the creditors, who claim a hypothecation, to prove the actual existence of the neces-

sity or of an apparent necessity for these things, which gave rise to his demand, and which are reasonably fit and proper for the ship, or for the voyage, under the circumstances of the case, and he must have acted, after he has used reasonable diligence with good faith in his inquiries, though he need not see to the actual and bona fide application of the money. In general it may be stated that where the expense of repairing a ship in a port in which she has taken refuge, would exceed one-half her value, the master will be justified in making sale of her. The American law appears to invest the master with a more extensive discretion than that of England. The English rule is, that it is the duty of the master to repair, unless he has no means to do so, and cannot procure any by the hypothecation of the ship or cargo. But all the cases agree that this power is to be exercised only in a case of clear necessity, and that the transaction must be chararacterized by entire good faith.

The owners are responsible in damages for all tortious acts committed by the master within the course and scope of his employment. It is, in all respects, then, of the highest importance, that the master should be a man of experience, skill, prudence, and integrity. "The authority of a master at sea," says Judge Story, "is necessarily summary and often absolute. For the time he exercises the rights of sovereign control; and obedience to his will and even his caprices be-

comes almost indispensable. If he choose to perform his duties or to exert his office in a harsh, intemperate, or oppressive manner, he can seldom be resisted by physical or moral force; and therefore, in a limited sense, he may be said to hold the lives and personal welfare of all on board in a great measure under his arbitrary discretion. He is, nevertheless, responsible to the law; and if he is guilty of gross abuse and oppression, I hope it will never be found that courts of justice are slow in visiting him in the shape of damages, with an appropriate punishment." (3 Mason, 245.)

The mate, who is the second officer on board the ship, is not distinguished from the other seamen, except in the character of his duties. He may sue in the Admiralty, and has a lien on the ship for his wages. He succeeds, by virtue of his office, in case of the death, sickness, or discharge of the master, to the charge of the ship, and the government and management of the crew. He does not, thereby, however lose his character and privileges of seaman, but has thrown upon him cumulatively the duties of master.

The general character of the class of men who occupy the position of mariners, has rendered them the especial objects of care in the maritime codes of commercial countries. They are heedless, ignorant, and confident, removed from the advantage of civilized intercourse and the restraints and influence of home. Their employment is perilous, whilst it is most useful, and they

certainly deserve, as they have received at the hands of the administrators of the mercantile law, the most kind and considerate treatment. Accordingly the seamen employed in the merchant service are subjected to special regulations, provided by Acts of Congress for their government, and more particularly to guard their interests and protect their rights. It is rendered necessary under heavy penalties, that their contract of service should be in writing. Shipping articles, as this contract is termed, describe the voyage and the term of time for which the seamen are shipped; and such articles must be signed by every seaman on all voyages from the United States to a foreign port, and in certain cases to a port in another state, other than an adjoining one. If there should be no such shipping articles, the master is bound to pay to every seaman who performs the voyage the highest wages given at the port for a similar voyage, within the three next preceding months, besides forfeiting for every seaman a penalty of twenty dollars. On the other hand, the seamen are made subject to forfeitures if they do not render themselves on board according to the contract, or if they desert the service: and they are liable to summary imprisonment for desertion, and to be detained until the ship shall be ready to sail. Provision is made for the prompt recovery of seamen's wages, by the enactments that one-third shall be payable at every port at which the ship shall unload and deliver her cargo

before the end of the voyage; and at that time the seamen may leave the ship if the wages are not paid within ten days after they are discharged. They may sue before the ten days have expired if the vessel should be about to proceed to sea, and to facilitate their remedy they may all join in one suit. The seamen indeed have a threefold remedy to recover their wages: an action against the captain, an action against the owner, and a proceeding against the vessel.

Though the master has a right to discharge a seaman for just cause, and put him ashore in a foreign country, yet the laws of the United States make it highly penal, and subject the master to fine and imprisonment, if, without justifiable cause, he forces an officer or mariner on shore while abroad, or leaves him behind in any foreign port or place, or refuses to bring home those whom he took out, and who are in a condition and willing to return.

The general principle of the marine law is that freight is the mother of wages, and if no freight is earned by the ship, no wages are due to the seamen. The object is to make it as strongly as possible the interest of the mariner to stand by the ship, and not to desert her in the hour of peril. Where, however, the voyage and ship are lost from any cause proceeding from the misconduct of the owner or captain, the loss is not allowed to fall on the seamen. Neither will the voluntary neglect of the owner or captain affect

their claim. If the voyage should be made in ballast, and thus no freight be actually earned, they are still entitled. The ship might have earned freight, and to them it is the same thing as if it had been actually earned. No private agreement between the owners and the charterer or shipper can vary their rights. If, therefore, it is expressly agreed that the outward and homeward shall constitute but one entire voyage, so that no freight shall be earned unless both are performed in safety, and the vessel having delivered her outward cargo, is lost when homeward bound, the seamen are nevertheless entitled to their outward wages.

All deviations from the terms of the common shipping paper — the printed form in use, and which conforms to the general rules of the maritime law—are discountenanced by the Courts; and if additional burdens and restrictions are attempted to be imposed upon the seamen without providing an adequate remuneration, all such stipulations will be declared null.

There are two principal modes in which ships may be employed. The first is where the owner receives goods generally to carry, the captain signing bills of lading to the person delivering goods to be carried, in which case the ship is called a general ship. The other is when a ship is hired or leased on a charter-party for a certain voyage or a certain period of time. In this case the charterer may employ the vessel as a general

ship, or he may use it for the carriage of his own goods exclusively.

The hire of the vessel in either case is what is meant by the word FREIGHT. This is the legal meaning of the word, though it is often employed also to express the cargo itself. "Freight," says Chancellor Kent, "in the common acceptation of the term, means the price for the actual transportation of goods by sea from one place to another; but in its more extensive sense it is applied to all reward or compensation paid for the use of ships. The personal obligation to pay freight rests either on the charter-party or on the bill of lading, by which the payment of freight is made a condition of delivery; and the general rule is that the delivery of goods at the place of destination, according to the charter-party or bill of lading, is necessary to entitle the owner of the vessel to freight. The conveyance and delivery of the cargo is a condition precedent, and must be fulfilled. A partial performance is not sufficient; nor can a partial payment or ratable freight be claimed except in special cases, and these cases are exceptions to the general rule, and called for by the principles of equity." (3 Kent, 318.)

As an illustration of these general principles, allow me to state a few cases which have arisen. An action was brought on a policy of insurance on freight, and the question was whether freight had been earned by the ship. She sailed from Philadelphia to Surinam, with a cargo of provi-

sions and merchandise. During the voyage, Surinam was conquered by Great Britain. On her arrival the British Collector of the Customs refused permission to land any article of the cargo, nor could such permission be obtained, although repeated petitions were presented to the government. The consequence was that the cargo was not landed, and the captain entered his protest. C. J. Tilghman observed, in deciding the case, that although there was no adjudged case, the question had not escaped the notice of writers on the marine law. "In one of the ordinances of Lewis XIV (A.D. 1681) it is declared that on a charter-party to carry goods *out* and *in*, if during the voyage the commerce is prohibited and the vessel returns, the outward freight only is earned; and Valin, in his commentary on this article says the law is the same, if the vessel is freighted *outward* only. These ordinances and the commentaries on them have been received with great respect in the Courts both of England and of the United States; not as containing any authority in themselves, but as evidence of the general marine law. Where they are contradicted by judicial decisions in our own country, they are not to be respected. But on points which have not been decided, they are worthy of great consideration. I am strongly inclined to adopt the rule laid down by Valin, because I think it reasonable. The owner of the ship has been in no fault whatever. When he took the goods on freight there was an

open commerce between Philadelphia and Surinam; the goods were carried to the port of delivery; the vessel waited there seven days, and the captain offered to deliver the cargo to the consignee, who refused to receive it. Nothing prevented it but the prohibition of the British government. It is not like the case of a vessel, which is prevented from entering the port of delivery by a blockading squadron; for the voyage is not performed; and it is impossible to say *certainly* that it would have been safely performed if there had been no blockade. I think it most agreeable to reason and justice, that the obtaining permission to land the cargo should in this case be considered as the business of the consignee. That being established, it follows that freight was earned." (4 Dall. 455.) In another case, the plaintiff, on the 9th March, 1813, contracted to ship 631 barrels of flour on board the Minerva, a Spanish vessel, of which the defendant was master, from Philadelphia to Havana, at four dollars per barrel. The flour was accordingly put on board by the 16th March, the ship then lying at the wharf in Philadelphia. On the same day the bills of lading were signed, and the ship cleared out at the Spanish consul's. When the contract was made both parties expected a blockade of the Delaware by the British, and accordingly notice was received in Philadelphia on the 16th March, that the blockade was instituted. Under these circumstances, the plaintiff several times applied

to the defendant either to proceed on his voyage or to deliver up the flour; and the defendant on the last application refused to do either, unless the plaintiff in case of the flour being delivered to him would pay one-half freight, or in case the vessel proceeded, would guarantee the ship and two-thirds of the freight. The plaintiff therefore brought an action to recover possession of the flour. The only question on the trial was, whether the property was in the plaintiff at the commencement of the action. That he had the general property was not denied; but it was contended on behalf of the defendant that the agreement to carry on freight, being not dissolved, but only suspended by the blockade, he had a right to detain the flour during the blockade, in order to carry it to Havana when the obstruction should cease. C. J. Tilghman said: "Whether the contract was dissolved or only suspended, is a difficult question. It has been very well argued, but the Court does not think it necessary to decide in this action. Where freight is earned, the master may detain the goods till the freight is paid. But it is not pretended that any freight was earned in this case. On what ground then can the defendant support the right of detention? It was to be expected that the blockade would continue a long time. Summer was approaching, and during the hot months flour is a perishable article, or at least it is subject to that kind of damage which renders it of little value. Was it to remain on shipboard

till it was spoiled, and then the very subject of the contract be destroyed under the pretence of preserving the contract. This would be absurd. No authority has been shown by the defendant's counsel against the plaintiff's right to have his property relanded and delivered to him in a case like the present; and Valin, the most favorable of all the authors cited for the defendant, expressly says that in case of blockade, the shipper has a right to release his goods without giving any security; although in consequence of a French ordinance, he must indemnify the master in case the goods are not reshipped, when the blockade ceases. In case of goods of a perishable nature, this indemnification would be a matter requiring good consideration. But I shall give no opinion on that point. If the law allows the master indemnification or compensation, it must be sought in an action on the case." (3 Serg. & Rawle, 559.)

Freight *pro rata itineris*, as it is termed—that is apportioned freight—accrues to the ship-owner, wherever the shipper voluntary accepts his goods, and the carrier or his agent delivers them, at a place short of the place of original destination. If a person contracts to carry my goods from Philadelphia to Barbadoes, for which I agree to give him a certain price, and he being driven to Antigua by stress of weather, offers to carry them on to Barbadoes, and I refuse, in that case he is entitled to the whole freight, because I am the cause of the contract not being performed. On

the other hand, if I ask him to carry them on, and he refuses, in consequence of which the goods are delivered at Antigua, he is entitled to no freight, because he has not performed his contract. It would be most unreasonable if he should; for it might happen that the freight from Antigua to Barbadoes would be more than from Philadelphia to Barbadoes. But it may happen that the shipper may find it his interest to accept the goods at some other port than that of delivery. In that case it would be just that he should pay freight *pro rata*. But this would be a new contract; and if he accepts the goods without expressly contracting to pay freight, the law will imply a contract. In order to raise this implication it is necessary that the goods should be accepted by the shipper or his agent voluntarily; for if they are in that situation, that the agent or supercargo takes them against his will, and sells them for the benefit of whom it may concern, no freight can be recovered. (3 Binney, 437.) Therefore, where the shipper accepts the goods voluntarily, at an intermediate port, he cannot claim to charge the ship-owner with the expense of forwarding them to the original port of destination. "Nothing is clearer," says C. J. Gibson, "than that the contract is entire, and that acceptance of the goods at an intermediate port is an abandonment of it. When it is not entirely performed by delivery at the place of destination, the merchant being liable for no payment but *pro rata*

freight, and for that only in special cases, is entitled to nothing for time and labor spent in partial conveyance. * * * I find no authority to charge the carrier in such a case with the duty or expense of subsequent transportation. On the contrary it results from the indivisibility of the contract that the merchant, having taken the goods into his own keeping, for his own purposes, is the person for whose benefit they are to be forwarded, and who is consequently to bear the expense of it. As to him the voyage is ended; and as to the future the carrier has neither duty nor reward. The merchant has superseded the contract by an arrangement of his own, and can claim nothing for the prospective charges under it." (8 Watts, 479.)

It is well settled that notwithstanding the words, which are universally introduced into the bill of lading, that the goods are to be delivered to the consignee "he paying freight,"—the consignor remains personally liable for its payment. These words are not inserted for the benefit of the consignor, but of the carrier. The personal liability of the consignee arises only from his acceptance of the goods.

It has been determined that the transfer of a general ship, before delivery of the cargo, passes the right to sue for the freight; and the law implies a promise to pay by the consignee receiving the goods. The implied contract is entire; and generally speaking, till all is earned, nothing is earned. The principle extends even to the

mortgagee of a ship in possession, who, like a mortgagee of land in possession, is entitled to take the profits. It is inapplicable, however, to a chartered ship,—the freight in that case being payable according to the terms of the charter-party: and it was held to be payable to the assignee of the ship, even when the transfer took place after the arrival of the ship, and before the actual delivery of the cargo. "There has been no decision," said C. J. Gibson, "that I am aware of, as to the precise point of limitation in regard to payment of freight, where the delivery has been delayed beyond a reasonable time; but in analogy to the ending of the voyage as regards the wages of seamen retained to discharge the cargo, we may say there was no reasonable delay in this instance. * * * Fifteen working days have been allowed for this purpose; and all concur that the voyage is not ended before that time or the actual discharge of the cargo, to found a demand for wages; and why, to found a demand for freight? The difficulty is to discover what the ship does to earn freight, while she is lying at her moorings. She conduces to the purposes of the voyage, if not in the further transportation of the property, at least in the preservation of it, till the consignee is ready to receive it, which is a part of her proper business. She was at every intermediate moment, therefore, earning the reward, and if the transfer of the ship was made before the cargo was delivered, the transferree was entitled to the freight." (9 Barr, 489.)

A *Bottomry Bond* is a security for a loan of money upon the ship or ship and accruing freight, at an extraordinary interest upon maritime risks to be borne by the vendor for a certain voyage or for a definite period. It is in the nature of a mortgage, by which the ship-owner, or the master, in his behalf, pledges the ship as a security for the money borrowed, and it covers the freight of the voyage or during the limited time. We have seen that the master has authority to make such a pledge only in a clear case of necessity. To make the extraordinary or marine interest lawful, in other words, to save it from the penalties and other consequences of usury, the money must be put at risk; or to speak the language of the books, to such a bottomry a risk is essential. It is this alone which makes it lawful to take marine interest.

A *Respondentia Bond* is a security for a loan of money upon the pledge of the cargo; and generally it is only a personal obligation on the borrower, and not a specific lien on the goods, unless there be an express stipulation to that effect in the bond; and it amounts at most to an equitable lien on the salvage in case of loss. The condition of the loan is the safe arrival of the subject hypothecated; and the entire principal as well as the interest is at the risk of the lender during the voyage. The money is loaned to the borrower upon condition that if the subject pledged be lost, by a peril of the sea, the lender shall not be repaid

except to the extent of what remains; and if the subject arrives safe, or if it shall not have been injured except by its own defect, or the fault of the master or mariners, the borrower must return the sum borrowed together with the maritime interest agreed on, and for the repayment the person of the borrower is bound. (3 Kent, 354.) In some forms of Respondentia Bonds, it is provided that "if during the voyage, and before the return of the said property, an utter loss of the said ship or vessel by fire, enemies, men of war, or any other casualties, shall unavoidably happen, and the borrower shall and do, within three calendar months after such loss, well and truly account for, upon oath or affirmation, and pay unto the lenders a just and proportional average on all the goods on board and the net proceeds thereof, and all other goods, which the said borrowers shall therefrom acquire during the said voyage, and shall ship on board the said vessel, and which shall not be unavoidably lost as aforesaid, then the obligation to be void." In a case which arose under such a contract, it appeared that the ship on her voyage from Calcutta to Philadelphia, put into Port Royal in the Island of Martinique for repairs; there she was condemned, and the goods unladen and sent to Philadelphia in other vessels. It was held that the borrowers were liable. It was considered that it must have been intended that the borrowers should pay the debt, when he received all his goods undamaged; otherwise the vendor would

be involved in the risk of the market, which could not have been intended. The argument that because the ship was lost technically, the goods were thrown upon the vendors, in fact reduced the contract to a simple wager upon the market; than which nothing can be more foreign from the whole scope of the writing. The most liberal construction and in general the most favorable to the borrower, would be to consider it as a contract of insurance; for then he will be indemnified for those partial losses which so frequently occur. Now considering it as an insurance on the goods, the assured could not recover. It is not essential that the goods should be brought home in the same bottom in which they were shipped. They must not be shifted without necessity; but when necessity exists they may be sent in another vessel, and while in that vessel they are at the risk of the insurer. (8 Serg. and Rawle, 138.)

LECTURE VII.

ON MARINE INSURANCE.

Verbal Contract to Insure—Form and Construction of Policy—Usage Admissible to Explain—Insurable Interest—Wager Policies—Double Insurance—Concealment or Misrepresentation — Warranties — American Property — Freedom from Seizure — Seaworthiness—Rotten Clause—Deviation—Perils Insured Against—Open and Valued Policy—Evidence of Loss from Peril Insured Against—Proximate Cause of Loss—Barratry of Master and Crew—Total Loss—Actual—Technical—General Average — Particular Average — Abandonment — Return of Premium.

The Contract of Insurance assumes several forms, but the general principles which regulate its construction and enforcement do not materially vary. It may be defined, in general, to be a contract whereby one party, for a stipulated premium, undertakes to indemnify the other against certain contingencies, by which he may be exposed to pecuniary loss. This definition is broad enough to include insurance against fire and on lives, as well as against the risks which attend upon the transportation of merchandise either by land or water. It is the latter which is more properly a mercantile contract, and to that, therefore, as

more appropriately falling within the circle of subjects assigned to this course, I have deemed it best to confine myself.

Some doubt has been entertained and expressed as to whether a mere verbal contract of insurance is valid. On the general principles of contract it would seem that this doubt must be resolved in the affirmative. Yet no prudent merchant should ever rest satisfied with such a contract. Agreements to insure, either oral or evidenced merely by a written receipt for the premium, are not uncommon, and they have been recognized as having all the characters of an actual contract of insurance. In such cases the agreement of the parties being complete, and all the terms settled, nothing remains to be done but a formal execution and delivery of the policy. It would be highly inequitable, under such circumstances, to deprive the party who relies upon such an agreement, and who has suffered a loss, of his remedy, merely on account of the want of that formality. Still it ought to be earnestly inculcated upon merchants never to put off unnecessarily the business of obtaining a regular policy, and thus possessing themselves of the most unexceptionable evidence of the contract and its terms.

A policy of insurance is generally a printed form, and having been made up from time to time by merchants and underwriters (as those who insure are generally called) is a somewhat incoherent instrument. The principles of construction

applied to it by the courts are, therefore, more liberal than those adopted as to most other contracts. The question, indeed, as to all contracts is, what is the real intention of the parties; but in regard to this contract the courts are more disposed to bend the words so as to accomplish what, under all the circumstances of the case, was their meaning. They have said: A policy should be construed according to the understanding of merchants, and observed with the purest good faith; and in insurance cases in particular, mercantile usage must determine the precise meaning of the words. Their intention is, if possible, in the first instance, to be collected intrinsically from all the expressions contained in the written instrument: but where that is silent as to the object of research, it may be inferred from extrinsic circumstances. The subject-matter of insurance makes it necessary to go out of the written instrument in order to interpret it more frequently than in most other contracts. Policies are to be construed largely, according to the intention of the parties, and for the indemnity of the party insured, and the advancement and security of trade. Facts and circumstances outside of the instrument may be proved in order to discover the intention of the parties.

It has been determined by the Supreme Court of this State that evidence of the usage of merchants is admissible to assist in the construction of the policy. In the case in which this was decided, an insurance was effected on a vessel for

and during the term of twelve calendar months, with liberty of the globe, and if at sea at the expiration of the twelve months, the risk to continue at the same rate of premium until her arrival at her port of destination in the United States. It was held that evidence was admissible to prove that the voyage described in the policy was known among merchants and underwriters as a trading voyage, and that on such a voyage, on such a policy, it is the usage of trade that the vessel should sail for any part of the globe to which she can get a freight at any time during the continuance of the twelve months, and that by the usage of trade she continues to be covered by the policy during such voyage, after the expiration of the twelve months, and that such usage was well known to and acted on by the underwriters of this port. The ship in that case, at the expiration of the twelve months, was at sea in a voyage from Rio Janeiro, in South America, to the Island of Jersey, in the British Channel, and had not, therefore, at that time, "a port of destination in the United States," so as to come literally within the words of the policy. "We are not able," said Judge Sergeant, "to distinguish this case from the numerous cases decided, in which proof of such a usage has been admitted to vary and control the language used in the policy, and to give a construction different from that which it otherwise would have received or did receive. All the cases that have arisen seem to have been pretty much de-

cided one way, and to have adopted and enforced the principles laid down by Lord Mansfield, that the assurer (or underwriter) in estimating the price at which he is willing to indemnify the trader against all risks, must have under his consideration the nature of the voyage to be performed, and the usual course and manner of doing it. And as in a voyage to a place or port, usage has been called in to show what was meant by the description of such voyage, so may it explain what was meant by a voyage of the description in this policy, and to bring within the voyage described in this policy what on the face of it would not be within it. Usage may add a new construction, variant from the face of the instrument as much as if it had been contained in a new clause or by reference to it. (5 Watts & Serg. 116.)

So, where the terms of the policy are ambiguous, resort may be had to the written order of insurance, in order to explain it, and the filling up in writing of the blank printed forms is always held to control the printed form itself, as more clearly indicative of the meaning of the parties, being the words they have themselves adopted in the particular case.

It is necessary that the assured should have an insurable interest in the subject-matter of the contract: that is, he must be subject to a pecuniary loss from the happening of the contingencies insured against. Wager policies, as they are termed, wherein the insured has no interest or a colorable one merely, or having a small interest much over-

values it in a valued policy, under the cloak of insurance, are reprobated, as are all other gaming contracts, both by our statute and common law. It has been finally settled in Pennsylvania that no action can be maintained to recover a sum of money alleged to have been won upon a wager or bet of any character whatever; but long before the Supreme Court had arrived at this sound and satisfactory conclusion, it had been sternly applied to the contract of insurance, and that contract required in all cases to be *a contract of pure indemnity*. Its object in all cases is not to make a positive gain, but to avert a possible loss. A man can never be said to be indemnified against a loss which can never happen to him. There cannot be an indemnity without a loss, nor a loss without an interest. A policy, therefore, made without interest, is a wager policy, and has nothing in common with insurance but name and form. It is not subservient to the true interests of fair trade and commerce, but is pregnant with as much mischief, both public and private, as can proceed from any species of gambling, either with stocks or cards, which the legislature has hitherto found it necessary to repress.

Hence it is that an insurance, being a contract of indemnity, one satisfaction only can be received by the party insured. Where, therefore, there is a *double insurance* of the same subject, that is, where the property is twice insured on the same risk and for the benefit of the same person, the

insured may, at his election, sue either set of underwriters, and upon a recovery against one, the other writers are bound to contribute in proportion to the sum they have respectively insured. A clause, however, is now, and has been for many years, inserted in our policies, that in case of any prior insurance, the subsequent insurer shall be liable only for so much as the amount of the prior insurance may fall short of covering the loss without any deduction being made for the insolvency of the underwriters, and that the policy, so far as the property has been previously insured, shall be considered null and void to all intents and purposes; the premium in such case, or a proportionate part thereof, to be returned, and the first insurer to have no claim to contribution. To constitute a double insurance the property must be twice insured, on the same risk, and for the benefit of the same person. If different persons claim different interests in the same subject, each may insure his own interest, and yet the insurance is not what the law esteems double. Whether made, however, in the party's own name or the name of others is immaterial, so that the insured is to have the benefit of both policies.

It is an important question, what is such an interest in a mercantile adventure as may be insured? The insurer need not be the owner of the subject-matter at risk, but he must have a real interest in the success of the adventure. A factor who has a lien on goods in his possession, has an interest.

When the supercargo of a vessel about to sail for Calcutta, by writing, which recited that he was indebted to A. in twenty-five hundred dollars, engaged to ship goods to him to that amount arising out of his outward commissions on the voyage, and to consign the shipment to A. for the purpose of liquidating the debt, and in case of death or any accident happening to him, assigned his commissions on the voyage and the proceeds thereof to A. and authorized him to make insurance on his commissions out, it was held that A. had an insurable interest. (9 Serg. & Rawle, 103.) That is, a party advanced a sum of money to the owners of a ship, in consideration of which they gave him a right to fill up a certain part of the tonnage of the ship for that voyage with goods either his own or the property of others. The party making such an advance was subject to loss; for whether he used the tonnage for the transportation of his own goods or the goods of others, he would lose his money unless the ship performed the voyage in safety. It seems to be considered as a criterion, whether the interest of the insured is of such a nature that it could be abandoned or ceded to the underwriter in case of partial loss. And, therefore, upon an engagement to ship goods to A., when the goods in fact were shipped to B., and A. insured, it was held that he could not recover where the goods were lost by the perils insured against. Whatever his damage might be, from the breach of the agreement by the con-

signor, he had no interest in the goods themselves which he could have ceded, even though it was provided that B. should deliver the goods to A. upon the payment of their cost price and expenses. So it has been decided that the disappointment of a reasonable hope of obtaining a cargo for the owner of the vessel himself, at the port to which she is sailing with specie on board to purchase a cargo, but when no cargo has been purchased, nor a positive contract made for the purchase of one, does not authorize a recovery on a valued policy, on freight, when the ship is lost on the voyage to the port of destination.

It is the duty of the insured, in effecting an insurance, to make a full and frank disclosure to the underwriters of all facts material to the risk within their knowledge, and which the underwriter could not be expected to know without such communication. A concealment or misrepresentation avoids the policy.

It is usual for the underwriters to require the assured to make certain warranties, and these are incorporated in the policy. A warranty is an agreement by the assured in the nature of a condition precedent, which must be strictly and literally performed before the assured can recover. It is of no consequence whether it be material to the risk or not, and it is equally unimportant to what cause the non-compliance with it is attributable. There is a material distinction between a warranty and a representation. A representation

may be equitably and substantially answered, but a warranty must be strictly complied with. A warranty in a policy of insurance is a condition or contingency; and unless that is performed, it is no contract. It is perfectly immaterial for what purpose a warranty is introduced, but being inserted, the contract does not exist unless it is literally complied with.

The most usual warranties are of the national character of the property insured, and that the trade in which it is engaged is not illicit or prohibited. A warranty of American property amounts to an engagement not only that the property was American at the time of the insurance, but that it should not lose that character during the voyage by any act or omission of the assured or of his agents, and that it should have all the necessary documents to establish its neutrality, if questioned, required by treaty or by the law of nations. It is not necessary that the vessel should be American built or registered. It is enough that she is owned by an American. "An American bottom," says C. J. Tilghman, "strictly speaking, may be said to be a vessel built within the United States. But that cannot be the meaning of the warranty which was intended for the benefit of the insurers. A ship may be built in America and owned by a foreigner, a subject of one of the belligerent potentates. In that case she would derive no protection from the circumstance of being built within the United States. On the

other hand, a vessel may be built in foreign parts, and owned by a citizen of the United States, under circumstances which would entitle her to every privilege *within* the United States, and every protection *without*, which can belong to a vessel built in the United States. The warranty must be construed, therefore, to mean, a vessel owned by citizens of the United States, and furnished with the usual documents required by our laws and treaties with foreign nations, so as to protect her from capture by any of the belligerents." (5 Binn. 464.)

It is not incumbent, indeed, on the insured to prove in the first instance that the ship was furnished with all the necessary documents. Anything, however, which shows probable cause to suspect that the necessary papers were wanting will throw the burden of proof on the insured.

The warranty of neutrality in a policy upon the ship is broken if the general agent of the ship and cargo covers enemy's property; and so if the general agent of the cargo covers belligerent property in the same vessel, though without the knowledge or participation of the principal, for the property of such principal, though distinguished from the covered property by invoices and other papers, is liable to condemnation, and the underwriter, if there is a warranty of neutrality, is discharged.

By a warranty of American property it is understood not only that the ship belonged to an

American citizen at the time of the insurance, but should continue so during the voyage; and that the captain and agents of the owners should conduct themselves conformably to the laws to which neutrals are subject. A neutral may lawfully carry the goods of one belligerent, subject to the right of capture by the other. The captor takes the goods, paying freight to the carrier, if he has acted fairly. But when the neutral, not content with carrying, undertakes to cover the cargo by false papers and false oaths, he violates the duties of neutrality as well as morality; he takes part in the war, by favoring one belligerent and attempting to defraud another. Such conduct, therefore, was held to amount to a breach of the warranty.

In the present war between the Allies and Russia, an important relaxation of the ancient rules of maritime warfare has been made in favor of neutral commerce. Not only the right of seizing an enemy's property when on board a neutral, unless it be contraband of war, has been waived by Great Britain, but it has been announced also as the intention of that power, not to claim the confiscation of neutral property, not being contraband of war, found on board enemy's ships; and further, that being anxious to lessen as much as possible the evils of war, and to restrict its operations to the regularly organized force of the country, letters of marque, for the commissioning of privateers, have not been issued. The beneficial

effects of these wise and liberal privileges have been already largely experienced; and the way has been open to establish as a recognized part of the law of nations, the important privilege that "free ships make free goods." This, with the accompanying regulation, which shall abolish buccaneering on the great highway of nations in time of war as in time of peace, has always been earnestly contended for by the government of the United States in its diplomatic intercourse with other nations; and we may justly entertain the hope that the day is not far distant when the existence of war will add little or nothing to the perils of the merchant in the navigation of the seas, against which he will need to protect himself by insurance. Under such a rule of international law the clause of warranty of neutrality might be entirely omitted.

"Free from any charge, damage, or loss, that may arise in consequence of seizure or detention of the goods for or on account of any illicit or prohibited trade," is a clause introduced into the policies of this country, about the year 1788, to prevent disputes concerning losses by seizure for breach of the revenue laws of foreign countries. To bring a case within it, there must be both a seizure, and an illicit or prohibited trade. It is not enough, that a seizure is made on an allegation of prohibited trade. It must be proved that there was a prohibition, and that the case is within it; and it must be a legal prohibition, such as the prohibiting power had a right to make. It was held,

therefore, that seizures under the Berlin and Milan decrees, forbidding to neutrals all commerce with England, were unlawful acts of violence, and not within the clause against illicit or prohibited trade.

Besides the express warranties which may be introduced, there is in every contract of marine insurance, an implied warranty of seaworthiness of the ship at the commencement of the voyage. A vessel insured must be in all respects fit for the trade wherein she is employed; she must, too, be properly manned and equipped for that purpose. To determine a question of seaworthiness, the nature of the voyage is to be considered. It requires a different strength of vessel and different furniture and equipments, to make a long voyage and a short one; to navigate the ocean, a lake, or a river. But the law implies no warranty of seaworthiness except at the commencement of the voyage. It has been held, therefore, that when a vessel has received damage from a peril insured against, and puts into port to repair, the captain or agent, who superintends the repairs, is only bound to use due diligence. It may be impossible to make a complete repair, either for want of materials or of skilful workmen, or of accommodation for heaving the ship down in order to make a thorough search. To say that a ship, which has suffered damage by a peril insured against, must at all events be so repaired at the port into which she is compelled to put as to render her then sea-

worthy, is to add to the contract a condition not contained in it. So also upon an insurance "at and from" a place, the warranty of seaworthiness must be referred to the commencement of the risk, and if between that and the sailing of the vessel she becomes unfit for sea, without the fault of the assured, and is afterwards lost, the assured may notwithstanding recover. Seaworthiness is in general a question of fact for the decision of a jury; but here a question has frequently arisen as to where lies the burden of proof—upon the assured to prove the seaworthiness, or upon the underwriter to disprove it. It is settled that the assured is not put to the proof of seaworthiness in the first instance. Seaworthiness is presumed, unless something occurs in the voyage which renders it doubtful, and then the assured must prove it. If it appears that the loss, which has arisen, may be fairly imputed to sea-damage, or any other unforeseen misfortune, and the underwriter means to defend himself on the ground of her not being seaworthy at the time of her departure, the burden is upon him to prove it. On the other hand, when a ship, which has not been disabled in her voyage by an accident or stress of weather, is found unable to reach her place of destination, there is a presumption that she was unseaworthy when she sailed, which it is incumbent on the assured to disprove; and the presumption ought equally to hold in a case of damage from a leak not shown to have been

caused by any accident or force insured against. Where a ship insured suffered a partial loss in a gale of wind, clearly attributable to one of the perils insured against, but reaches her port of destination in safety, the underwriter is not precluded thereby from taking defence that the vessel was not seaworthy. "The best provided vessel," says Judge Sergeant, "may meet with misfortunes and founder at sea, or be compelled to return to port. On the other hand, a weak and insufficient ship may attempt the voyage to the imminent danger of the lives and property on board, and yet escape destruction almost by a miracle. It is not by events that human affairs are to be judged. Experience teaches us that in a vast majority of these cases, unless due precautions are taken, disaster will ensue; and therefore the law requires it of the insured as a condition precedent to the attaching of the contract of insurance, that the vessel, at her departure from port, be tight, stanch, and strong, well-fitted, manned, and provided with all necessary requisites to meet the perils of the ocean, which she is to encounter in her voyage. And the inquiry is not, after the voyage is ended, has she escaped notwithstanding a gross neglect of all that prudence dictated for her preservation; but was she equipped and fitted out as she ought to have been. Nor is it wise to tempt owners and shippers to run into danger when unprovided to meet it. The disasters of mariners, not unfrequently of the most dreadful and appalling character, ought

not to be multiplied by stimulating them into unnecessary experiments, how far they dare venture in a leaky vessel. The law casts her mantle of protection over them, as well as the interests of the shipper by declaring that no insurance of the vessel is valid, if she is put to sea in an unworthy state; and it is of importance to the great interests embarked in commerce, as well as to the preservation of life, that the requisitions of the law in this respect should not be relaxed." (1 Whart. 399.)

There is a clause usually inserted in policies, "that if, after a regular survey, the vessel should be condemned for being unsound or rotten, the insurers shall not be liable." Under this clause it has been held that, where the condemnation is for rottenness or unsoundness alone, and no other cause is stated, the condemnation is conclusive upon the insured, and the underwriter is discharged; but when the condemnation is for a mixed cause, or if the whole survey, taken together, show defects, arising partly from accident and partly from decay, the underwriter remains chargeable. This *rotten clause*, as it is usually termed, may sometimes bear hard upon the assured, because it precludes him from showing that the vessel was seaworthy at the commencement of the voyage. It is, however, the contract of the parties, and therefore obligatory upon both. The intention of it was to prevent disputes. It is sometimes exceedingly difficult to prove what was

the condition of a vessel as to soundness when the voyage commenced. Both parties, therefore, agree, that if, on a survey, there should be a condemnation for unsoundness, it shall be taken for conclusive evidence that the vessel was not seaworthy at the commencement of the voyage.

It may also be considered in the light of an implied warranty, that the ship shall follow the route of her prescribed voyage without unnecessary deviation. It is not so termed in the books, but it has this characteristic of a warranty, that a deviation avoids the policy without any reference to its actual effect on the risk. Any departure from the usual course of a voyage, or stopping at any place, even in the course of the voyage, which is not permitted by the policy, is a deviation, which will avoid the policy, unless it took place for some justifiable cause; such as to repair, obtain necessary refreshments, avoid an enemy, assist another ship in distress, or the like. So, if a vessel, after being captured and carried into port, remains in the port after her release longer than is necessary to prepare for her voyage, it is a deviation; and the same reason would apply to any other justifiable deviation; it must not be protracted for an unnecessary period, especially if the occasion be used for other commercial ends than those connected with the original adventure. But if the master of a ship finds that a change has taken place in the commercial relations of his port of destination, he may proceed to a neighboring

port to obtain information, and continue there until the impediment obstructing his voyrge is removed; and while he thus lies by for fair purposes, the property insured is protected by the policy. But a mere intention to deviate in the master or owners, if for any reason it is not carried out, will not make the policy void.

The perils enumerated in the common printed policies are sufficiently comprehensive to embrace every species of risk to which ships and goods are exposed from the perils of the sea, and all other causes of loss incident to maritime adventure. The enumerated list, however, may be enlarged or abridged at the pleasure of the parties.

When the insured comes to seek indemnity from the underwriters, there is an important distinction to be drawn between an open and a valued policy. An open policy is one, in which the amount of interest is not fixed by the policy, but is left to be ascertained by the insured in case a loss should happen. A valued policy is where a value has been set on the ship or goods insured, and inserted in the policy in the nature of liquidated damages. A valuation fraudulent in fact as respects the underwriter, or so excessive as to raise a necessary presumption of fraud, entirely vacates the policy; otherwise the valuation is conclusive upon the parties.

It is incumbent on the assured to prove affirmatively that the loss he has sustained has been occasioned by one or more of the perils insured

against. If the loss arise from the ordinary wear and tear of a voyage, the underwriter is not liable. It is otherwise, if it happen in consequence of the violence of the wind and waves, running on rocks, or the like; and it is not sufficient for the insured to prove that there were storms on the voyage, unless he can fairly trace the injury sustained to that cause. Therefore, it has been held that the naked fact shown by the insured that the goods, after arrival, were found damaged by sea-water, is not evidence of a loss from the peril of the sea. "From the language of the books," says C. J. Gibson, "it would seem that an opinion has sometimes been entertained that there is a distinction between those perils which are extraordinary and those which are only ordinary. A loss by an immediate act of God, such as a tempestuous state of the weather, or by unforeseen causes, such as shoals or collision, which human sagacity or force could not prevent, certainly belongs to the former; but such as happen when the elements are propitious and in a clear sea, have been thought to be excluded from the range of the policy. But this distinction, if it ever existed, has been nearly if not altogether obliterated by the latter cases, in which it has been held that any damage from the immediate impulse of the winds or the waves, in whatever degree of excitement, is a proper subject of indemnity; for instance, damage from collision even by the negligence of those who had the injured vessel in charge. Still may not a cargo

become wet with sea-water by the agency of causes, with which the winds and waves have no connection? The contact may be produced by bad stowage, defective caulking, imperfect closing of the hatches, or want of pumping, to say nothing of rat-holes, which, indeed, in one case have been classed with perils of the sea; and damage from any of these causes but the last, must, by our law, be compensated by the masters or owners. It is expressly said by Mr. Marshall, in his Treatise on Insurance, that the master and owners are liable for damages from exposure of the goods to wet; that is, as I understand it, exposure by negligence, but not by an opening of the ship's seams from straining in a storm or on a shoal. But it certainly assumes that damage may be done by sea-water, without constituting a loss by a peril of the sea within the meaning of the policy." (3 Watts & Serg. 144.)

It is a settled principle both in marine and fire insurance, that in all cases the proximate and not the remote cause of the loss is to be regarded. Insurers are answerable for direct and immediate, not for consequential and remote loss from a peril insured against. If the peril insured against be fire, the instrument of destruction must be fire. On no other principle than that the character of the loss is determinable by the proximate cause of it, could the insurers have been held liable for the loss of the Dutch ship which was burnt by the Spaniards at Majorca, in consequence of an appre-

hension that the crew were infected with the plague. An inversion of the rule would have made them liable only in case the plague had been one of the perils mentioned in the policy. The converse of the rule, which charges the underwriters with a loss, of which the particular peril is the proximate cause, exempts them when it is the remote one, and this rule is a part of the general law of insurance. Thus it has been held that a loss from heat without ignition, in a process of manufacture, was not covered by a policy against fire; and so when goods were injured in the removal of them, under a reasonable apprehension that they would be reached by the flames, which had caught one of the houses in the same block.

It is to be observed that the barratry of the master or crew is always a peril specially assured against. Barratry means fraudulent conduct on the part of the master in his character of master, or of the mariners, to the injury of the owner and without his consent; and it includes every breach of trust committed with dishonest views. Thus an unlawful rescue by the master and crew of a captured vessel, by which a forfeiture was incurred, is an act of barratry. C. J. Tilghman considered that the cases upon this subject established two principles: 1. That any trick, cheat, or fraud, practised by the captain to the prejudice of his owners, is barratry: 2. That any crime committed by the master to the prejudice of his owners, is

barratry. Where the point turns on the fraud or cheating of the captain, it is always important to ascertain whether his conduct promoted his own interest; for if it did, in any considerable degree, and especially if his interest was in exclusion of his owners, the presumption is violent that his intent was fraudulent. But this test will not be sufficient to decide those cases which arise on the second branch of barratry from crime. What is crime? As applied to the present purpose, it is "a wilful breach of law to the prejudice of the owners." Now in this point of view, it is no consequence whether the captain has an interest of his own or not. It must be considered as an implied trust between him and his owners that he will not, without their orders, break a law, which subjects their property to forfeiture. It is understood to have been decided, that leaving a port without paying duties, and thereby rendering the ship liable to confiscation, is barratry. So it has been decided that it was barratry for the captain to make a cruise, in which he took a prize without a lawful letter of marque, although he libelled the prize in the name of his owners as well as his own; so if he carries on a trade forbidden by law, although his intention was to make a profit for his owners. (2 Binn. 574.) But it does not follow that every illegal act is a criminal one. For example: Suppose the master ignorantly commit a breach of blockade, or violate some foreign ordinance with which he is unacquainted, these acts

would be illegal but not criminal. The illegality of the act, though no improper or fraudulent motive appear, may be evidence of fraud or of crime, but this presumption may be repelled by evidence. If in reality there was no fraudulent or criminal intention—no particular view to the personal benefit of the master, but an honest though mistaken motive to benefit his owners—the illegality of the act will not make it barratrous. Gross negligence, it is said, is evidence of fraud in the master: but the continental jurists include all acts of negligence in the master and crew under the category of barratry, and the English Courts seem to be following in their footsteps. In a case in which the question came up in our Supreme Court, they said: "In England the modern decisions abundantly show that the limits of the risk from barratry have been enlarged so far as to admit a risk from negligence, provided the vessel were not unseaworthy at the beginning of the voyage, by reason of incompetence on the part of the master and crew. In America the lead of the English Courts has been followed in effect by the Supreme Court of the United States, and by the Courts of Massachusetts, Maryland, Louisiana, and Ohio, all but the last sea-board States, and the question is, whether we shall fall in with the tide or stand out on the ground of the old English law. But the American decisions, though agreeing with the modern English doctrine in their results, do not exactly agree with it

as to the process by which they are obtained. The English Courts require the assured to count (or make his claim) for a loss from barratry, and they, consequently, treat it as having happened directly from the peril insured against by that name. The American Courts require him to count for a loss from a peril insured against, as the proximate cause of which negligence was the remote one; thus holding the assured bound no further than to furnish a competent master and crew at the beginning of the voyage, without impliedly warranting that they will be diligent to the end of it." (7 Barr, 223.) The doctrine in the two countries produces the same results practically. If a loss arises from one of the perils insured against, though that loss may be attributable to the negligence of the master and crew, the underwriters will be liable, provided the master and crew were to be deemed competent at the commencement of the voyage.

There are three kinds of losses: Total losses—General average—and Particular average.

Total losses are again subdivided into Actual total losses, and Technical total losses. An actual total loss is where the subject-matter is entirely destroyed. A technical total loss is where the damage exceeds fifty per cent. of the value. It is in the latter case only that the insurance law requires the assured promptly to abandon or cede all his property or interest in the subject insured to the underwriters, if he would claim from them

as for a total loss. The assured, however, may waive this if he chooses. He may decline an abandonment, and recover according to his actual loss, be it what it may. If the loss is under fifty per cent., the assured is not permitted to abandon; if equal to fifty per cent., or above it, he may abandon. Even then, however, it is still competent to the underwriter to offer to repair the ship, and after such offer, the insured cannot insist upon the abandonment. The inclination of the Courts is to confine the contract of insurance to its true intent, which is to obtain an indemnity in case of loss, but not to be put in a better condition in consequence of loss. It is desirable, therefore, to ascertain the actual loss and give a compensation for it in all cases where it can be done. That the insured may abandon where the damage exceeds one-half the value of the ship, is a general principle, subject, however, to exceptions. If the insurer will undertake to repair the damage, though exceeding one-half the value, he may do it, and the insured shall not abandon; because, if his ship is repaired, it is all he has a right to demand, and the more or less of cost is immaterial to him. In conformity with these principles, it has been held, that if a vessel arrives at her port of destination when the policy ends, it is of no importance that she cannot be repaired there at all, if the injury previously sustained does not amount to fifty per cent. of her value.

General average means a contribution, made

by all parties concerned, towards a loss sustained by some of the parties in interest for the benefit of all. In such cases the loss arising from the contribution falls within the provisions of the policy. Thus to give a familiar illustration: If ship and cargo, belonging to different owners, are insured by different underwriters, and a part of the cargo is thrown overboard to lighten the ship in a storm, the owner of the cargo is entitled to recover from the owner of the ship his proportion of the loss. For the balance, to make up his full indemnity, he looks to his own underwriter who has insured the cargo, while the owner of the ship recovers from his underwriter, the insurer of the ship, the contribution he has been obliged to pay. The questions may be multiplied and complicated where there are various owners and underwriters of different parts of the cargo. All parts of the cargo saved, as well as the ship, contribute to the loss suffered by the particular owner whose goods have been sacrificed for the good of the whole. This contribution is called general average.

In order to make a case of general average, it is necessary that the ship should be in distress, and a part sacrificed to save the rest. It may be a part of the ship thus sacrificed, and then the owners of the cargo must contribute to the owner of the ship. Thus it may be necessary, and often is, to cut away the masts. It is necessary that the sacrifice should be conducive to the saving of the rest, and that it should be voluntary; for if

the loss is occasioned by the violence of a tempest, there is no reason for contribution. The particular owner of the part thus lost looks to his own underwriter for indemnity. Nothing can be more equitable than that all should contribute towards the reparation of a loss, voluntarily incurred, which has been the cause of their safety. It is not necessary that there should be consultation between the master and his officers and crew. That, indeed, would be demonstrative proof that the act was voluntary. If it sufficiently appears that the act occasioning the loss was the effect of *judgment*, it is sufficient; for in time of imminent danger, immediate action may be necessary, and time taken for consultation may be destruction. It has been held, therefore, that if a ship from the violence of the winds must go ashore somewhere, and the master chooses a place where she will be at least as safe as she could be anywhere else, still if he selects her place and incurs a certain loss thereby for the common benefit, it is a case of general average. And so also it was held to be where a vessel was voluntarily run ashore, and though the cargo was saved, the ship itself was totally lost, the owners of the cargo were bound to contribution. It is to be observed that the object in view, that is, the preservation of ship and cargo, had been in whole or in part effected by the sacrifice. If goods are thrown overboard to lighten the ship, notwithstanding which she is wrecked, neither the ship nor the goods

which happen to be saved shall contribute; because they were not in point of fact saved by reason of the sacrifice. But if the *jettison*, the throwing overboard, preserve the ship and cargo from the impending danger, and afterwards the ship is wrecked in consequence of a new peril, what is saved of the cargo shall contribute; because it would not have been saved but for the jettison. When the ship, however, is run on shore, the object in view, so far as concerns the cargo, may be completely obtained, though the ship be totally lost; because the goods are saved by means of the loss of the ship. There might be a case of jettison, resembling the total sacrifice of a ship, that is to say, the jettison of the whole cargo. In time of imminent danger general safety is the object, and ship and cargo are considered as one. Either may be sacrificed, in part or in whole, and whether in part or in whole, makes no difference, so far as regards the equity of demanding contribution from that which is saved.

Particular average is any partial loss from the perils insured against, short of a loss either actually or technically total. Indeed, a technical total loss is such only at the election of the insured, who may nevertheless treat it only as partial. In the case of such partial loss on the ship, the indemnity, payable by the underwriter, is calculated on the expense of repairs, where the owner chooses to repair; where he does not it is calculated on the best data that can be had. But where the

ship has been actually repaired, her value being now greater than it was before the disaster, by the replacement of old timbers and materials with new, the owner must contribute to the expense in proportion to the benefit, and that is, according to the usage, as one part to two. This is commonly called the rule of one-third new for old; that is, the owner bears one-third of repairs. In regard to goods, there is a material difference between the adjustment of a particular average, and of a general average. The former is adjusted according to the value at the time and place of departure of the vessel, and the latter according to the value at the port of destination. In cases of partial loss or particular average, the indemnity is to be adjusted upon a comparison of the gross proceeds of the sound and damaged goods. The underwriter has nothing to do either with the state of the market, or with the loss on landing expenses, freight, and duty, accruing in consequence of the deterioration. No premium is paid for these items, and all other modes of adjusting particular average, except that founded on the principle of the gross proceeds, are erroneous.

There is a memorandum, in almost every policy on goods, applied to certain articles (thence called *memorandum* articles) which by their nature are apt to be deteriorated from other causes than perils of the sea, that they shall be free from average unless general. It is now well settled that, although the memorandum articles are da-

maged to a greater amount than fifty per cent., the insurer is not liable, because the loss, though technically total, is still in fact but partial. In some policies there is a clause that "no loss or average shall in any case be paid under five per cent., unless general." Where a number of bales of cotton were insured with a separate valuation of each bale, and some of the bales were lost, but not amounting to five per cent. of the whole, it was decided that the underwriter was not liable.

Abandonment is a cession made by the insured to the insurer of all his interest in the thing insured whereon there has been a total loss, and the thing or any part thereof exists in specie. Wherever there is hope of recovery, in whole or in part, there must be an abandonment. It must be made within a reasonable and convenient time after the notice of the loss. But this rule does not apply to the case of an actual total loss arising from capture or seizure, where the property insured continues to be out of the possession or control of the owner up to the time of the abandonment; and, therefore, in case of such loss, the assured may abandon at any time before the property is restored to him, but unless the loss continues to be total at the time of the abandonment, the underwriter will only be liable for a partial loss.

It is the actual state of things at the time of the abandonment, and not the state of the party's information, that determines its validity.

The insured is entitled to a *return of the premium* wherever the risk has not attached, except indeed where the policy is void from fraudulent misrepresentation or concealment. Thus, if the ship be unseaworthy, the insured is entitled to a return of premium. The general rule is that where the voyage is entire, and the risk has once commenced, there shall be no return of premium. But when, by the course of trade or the agreement of the parties, the voyage is divided into distinct parts, and on one of these parts no risk has been run, there shall be an apportionment of the premium, and part shall be returned. A voyage may be entire though the ship is to go to a number of different places, and to take in different cargoes. But if, in the contract of insurance, there are certain contingencies introduced which, at certain periods of the voyage, may operate so as to make the insurance void, it has been considered that in such cases the voyage may be supposed to have been divided in the contemplation of the parties into distinct parts.

THE END.